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THERE IS GREAT NEED in London of barristers, solicitors, and students who would be prepared on not more than one night a week to give free legal advice to poor people at Cambridge House, Camberwell, and similar institutions, where essential help is provided for people who have no other means of obtaining opinion or redress. The work is intensely practical and is limited to advising.

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It is regretted that the exigencies of the war and its aftermath have reduced the space available for book reviews and made it necessary to give no more than short notices of some of the works received for review.

THE AIM OF LEGAL EDUCATION¹

E. C. S. WADE

MY first duty is to apologise for the delay which has caused me deliberately to wait until this relatively late date after my return to Cambridge a year ago before I felt able to deliver this inaugural lecture. For six years the locusts of war ate into my all too limited learning in the law, and involved a loss of all contact with academic life which made advisable a period of recovery—not yet completed—before I plucked up courage to say what I want to say to-day—in all too scanty words. I did, however, in the course of last year, address some informal remarks to the Cambridge University Law Society—and I take this opportunity of thanking their Officers for the invitation—on which occasion I put forward some considerations which seemed to justify the conclusion that the effect of the late war had been to stress the importance of public law.

I take it that the function of an inaugural lecture should be rather wider than a discourse on a field of specialised study. Accordingly I hope to say something about the teaching of Law, and Legal Research, in general.

In duty bound it is meet and proper that I should begin by some reference to those who have held this Chair in the past. It would be presumptuous to sing the praises of Frederick Maitland, with whose name the Downing Chair will for ever be linked. But it would equally be wrong on this occasion not to acknowledge the prestige which his unique contributions to learning as the holder of the Chair conferred upon the academic study of law. Particularly would I hail him for his foresight as to the direction which public law was to take. His 1887 lectures, wherein is to be found the first recognition of what modern public law means, were almost contemporaneous with the first edition of Dicey's *Law of the Constitution*. Maitland died nearly forty years ago; there are still a few among my audience to-day who can have sat at the feet of that illustrious scholar in our Law School. Yet all of us recognise that the prestige which belongs to this Chair comes from its tenure by that great scholar.

Of Maitland's successor, Courtney Kenny, again I cannot speak from personal acquaintance as a pupil; though his figure was familiar to me in my undergraduate days, I never spoke with him nor heard him lecture. I recall seeing him in his place at the back of the Lord Chief Justice's Court where he was wont to listen to important cases on the Criminal Appeal and Divisional Court List. To the most recent holder of this

¹ Part of an inaugural lecture delivered in the University of Cambridge on 1 November, 1946. The other part is published in the *Law Quarterly Review*, April, 1947, under the title 'The Courts and the Administrative Process.'

Chair, Harold Dexter Hazeltine, I take this opportunity of wishing him a peaceful old age after the severe illness from which all who know him have been glad to learn of his remarkable recovery. I shall always recall his kindly encouragement when I was a junior lecturer. My last reference to those who have gone before is to express the hope that I shall be spared the reputation of the *first* holder of the Chair, of whom Gunning, after some pages of robust libel, records that he was frequently to be seen in the public walks where his society was avoided by everyone whose time was of value, and that he died in the full vigour of his incapacity.

Before I leave the past I should like to record my thanks to the Master and Fellows of Downing College for enabling the long and close association of this Chair with the College, which was changed by the provisions of the statutes of 1926, to be continued from time to time by their standing invitation to me to dine at their hospitable High Table.

I now turn to say a few words on the aims of those of us who seek to teach law. For this, perhaps, is of more general interest to my audience, which includes some newcomers to the profession of law teaching, than what I have said about the administrative process.

An American scholar wrote of Maitland that he combined a fondness and capacity for large generalisations with scrupulous thoroughness in teaching a subject into minute details. He also said that he possessed, as we all know, an unrivalled power of historical imagination. If that gift is given to few of us teachers to-day, even in small measure, we can at least aim to acquire the first gift. The complexity of a modern society, and with it the ambit of its laws, is such as to confine most of us to specialised fields of study. The more important it becomes for us to learn to see the wood from the trees—to appreciate general tendencies and developments, as well as to keep abreast of detail in our chosen field of specialized study. Yet that surely should be the aim of those of us who stand aside from the hurly-burly of legal practice and have the time and perhaps the inclinations to criticize the law as expounded by the judges and, equally important in the twentieth century, as enacted by Parliament and the Departments of Government. Possibly it is inevitable that our contributions are largely of a negative character, by which I mean that they contain destructive rather than constructive criticism.

But it may be that we take too narrow a view of our functions. I grow more convinced as I grow older that there is a danger, not peculiar to the Faculty of Law, of over-emphasizing specialized studies—an infection which finds a fertile breeding ground in our rigidly delimited Faculty system. I do not for one moment suggest that the learning of law as we teach it is not an excellent mental discipline. Nor do I think that we are in such danger, as are some other Faculties, of specializing in our Part II courses on too narrow lines. Nevertheless, I should like to see more co-operation with other Faculties. If Roman Law has a place in classical history—and surely it must—our Civilians are surely the best qualified

people to impart instruction. The inter-relation of international relations and international law, of constitutional history and constitutional law are too obvious for emphasis. Economists study the problems of monopolies and how to control them. Our common lawyers could help much by expounding to them the law relating to restraint of trade. Is not legal history as legitimate a form of historical study as social, economic and constitutional history? We lawyers in all these fields need, in our time, to pay more attention to the social and economic background of the law at all periods of its history. We live among colleagues who are authorities on those matters. We want to seek more of the kind of intellectual co-operation which has produced in recent times the notable studies of D. L. Keir and F. H. Lawson, to take single examples of recent successful co-operation between an Oxford historian and an Oxford lawyer.

On the topic of the instruction we give in our law school, I do not intend to touch upon the choice of subjects for study—many of us have thrashed this out in the past year—beyond recording my belief that we should restrict our subjects in number and in scope and avoid aiming at the provision of full technical equipment at the expense of education. To overload our syllabus with a mass of subjects and complex detail means inevitably that our students lose sight of law as a great human institution serving social and economic needs, which alone is the justification for its existence and enforcement on the people it exists to serve. Method matters more than range of subjects and on this Maitland had something to say which is of value to us to-day in this age of specialization when he gave his inaugural lecture nearly sixty years ago—13 October, 1888. He said: 'The object of a law school is to teach law and this is not quite the same thing as teaching the history of law.' And a little later, 'I believe that anyone who aspires to study legal history should begin by studying modern law.' To this I venture to add 'study the law as an instrument of social purpose and not merely as a mass of technical rules.'

What, then, should we teachers aim to do if we are to follow the precepts of a great master? First, to study modern law and to teach it, not as an exercise in professional technique, but in relation to its place in the world in which we live. So, too, we must expound the law at any given stage of its long history. Law does not develop in a vacuum apart from the political, social and economic environment of the people it exists to serve. We lawyers are too apt to defend the law as it is against all criticism from outside. Perhaps our reason for this is that we have paid too little heed to Maitland's precept. Certainly I emerged twenty-five years ago from our Law School convinced that the age of perfection had well nigh been reached with the Judicature Acts of 1873 and 1875 and the entrenchment of Dicey's conception of the rule of law, and that the iconoclastic rumblings of Lord Birkenhead on the subject of our land law heralded disaster to the legal profession. My own

experience suggests that if we are to sow the seeds of constructive criticism in the minds of our students, there is at least a danger lest, by starting at the wrong end, they emerge from the jungle of the writ system, the complications of feudal law, and the burden of reading innumerable cases of the past, many of them unintelligible on account of their dependence upon ancient rules of pleading, at the fair haven of the mid-nineteenth century Judicature Acts, convinced that the millenium has been reached and suspicious of most later changes. Perhaps I exaggerate in my anxiety to sharpen the critical faculties of the lawyers of to-morrow, who will assuredly see greater changes than we have seen in the adjustment of law to public needs and public service; but this is pardonable in a student of public law who lives in an age of such rapid developments in his field of study.

Here a word or two may be in place about research. One of the lessons of the war has been the recognition of the crying need for research, and for the application of its results. Nor has this been confined to the natural sciences; it has received, the world of physics apart, its most striking appreciation in this country at all events in the field of our sister subject, economics. I am not competent to express an opinion about scientific research, but experience as a tutor at all events has shown that in that sphere there is much scope for team work. A young graduate can usefully proceed direct to fundamental research, but that is, I have inferred, because he is a junior recruit to a team working on the same or similar lines; he has daily contact with other and more experienced workers in the same field. But with a subject like law, it is surely different. It is unprofitable that a student fresh from the Tripos or with the LL.B. should, without even qualifying for the practice of a learned profession, sit down for another two or three years in the confines of a University and specialize in the minute details of a topic suggested to him by one of his teachers. In the field of law there is little which corresponds to the fundamental research of the natural scientist. The lawyer needs a more complete apparatus in the shape of experience of the law in action before his education is completed, and he can profitably turn to research. Therefore it is to the lawyer who has completed his training and has had some acquaintance with the law in operation that we must look if we are to devote our research resources to justifiable purpose. A need to-day is provision for a student in the late twenties or early thirties to return to Cambridge to engage upon research in law and other social services after experience in the field of their operation. Since teachers of law do not necessarily have that experience, it will be necessary to make financial provision, other than by teaching stipends, to recruit a few such workers to the field of research in law, on a scale high enough to attract the highest qualifications. Nor should this be impracticable at a time when here in Cambridge it has been found possible to establish a Department of Applied Economics, and recognition has been afforded to our own Department of Criminal Science. This is not, however, the place to discuss details of what are our needs. But

I put forward the suggestion as an aid to bridging the gulf between academic study and the practice of the law.

In this connection it is noteworthy that with one exception the eight research students in Public Law, who have come into residence since 1945, all of them graduates of other Universities, fall into the age-group which I have suggested can most profitably be employed on this type of work. It is perhaps significant that none of them are Cambridge men, and that all but one of them are aided from financial sources for which our own graduates are not eligible.

Finally, I think it is due to these men to say something about the work which they are doing. Incidentally this will show the wide and diversified range of public law topics. In the strictly constitutional sphere the distribution of the legislative powers in a Federal Constitution has been the subject of investigation by a teacher of Law from an Indian University. This has led him and me into fields which are more familiar territory for members of the Judicial Committee of the Privy Council than for teachers and students of English law. The 'pith and substance' as a rule of interpretation of statute law is seldom pleaded in our courts. Through this study has come a digression on the question of the extra-territorial operation of Indian enactments, in particular the Income Tax Acts. These studies, of course, require reference to the cases interpreting the Constitutions of the Dominion of Canada and the Commonwealth of Australia, as well as the already considerable case law which has resulted in the past nine years from the decisions of the Federal Court of India, which was guided in its opening years by that great constitutional lawyer and public servant, Sir Maurice Gwyer, and is now presided over by a former Chancery Silk.

It would be surprising had not the close association of the late war resulted in an awakening of interest in the administrative systems of the two great English-speaking communities. Sir Cecil Carr, in his lectures delivered at Columbia University in the early days of the war, and published under the title 'Concerning English Administrative Law,' sowed a seed which has now borne fruit in attracting to Cambridge a graduate of Harvard and New York to study comparatively the control of the administrative process. In both countries there is much uneasiness among lawyers bred in the individual tradition of the common law. It will probably be news to most lawyers on this side of the Atlantic to learn that Congress has already enacted an Administrative Process Act which is only the latest of the many developments which may be said to have started with the Report of the President's Committee on Administrative Management, which was made to President Roosevelt in 1937. A comparative study such as that upon which this research student has engaged shows that, despite the different political complexions of our representative governments, we are both struggling to analyze the same problem of the eternal conflict between liberty and government. It is only fair to admit that, even allowing for the preference for non-departmental agencies which characterizes the American system, the

Administrative Process Act of 1946 goes a great deal further than anything that has been attempted in this country to establish legal standards for administrative agencies.

From Greece we have drawn an enquiry by a member of the Athens Bar into the basis of the rule of law with particular reference to the means of protecting the liberty of the person. This is a subject familiar enough to the English lawyer who is apt to take it for granted that imprisonment without trial shall never be allowed and that censorship of the press shall be limited to time of war and then on security grounds only.

A Dutch student, recently prominent in the Resistance Movement, was admitted to Cambridge to study what is perhaps the most confused, and certainly not the least important of the topics of administrative law, namely, the liability of public authorities and their officers for injurious acts or omissions consequent on the existence of discretionary powers and duties.

A comparative study of the Trade Union Law of the United Kingdom, the Labour Law of the United States, and their counterpart in China has claimed the attention of a Chinese student. The new term has brought us two more recruits, one from Turkey and another from Eire.

Finally—and I have left the Englishman last only out of politeness to the others—the University of Leeds sent us last year the first of our research students to be drawn from the Local Government legal service. His studies have led him to examine afresh Dicey's conception of the rule of Law and the latter day criticisms. Without anticipating the product of his research one may say that destructive criticism is not his principal aim. We share common ground in stressing, as I have tried to do to-day, that the most insistent topic is the adjustment of the balance of the constitution to meet the changed conception of the field of government. It may be that the control of administration, if liberty is to survive under modern government in a form tolerable to a free society, will not come through the common law, though I have tried to show two ways where the common law can certainly make its contribution.² It is perhaps an unforeseen result of the seventeenth century alliance between the Common Lawyers and Parliament against the Crown that Parliamentary supremacy in the twentieth century has resulted in the present state of administrative regulation, which can as yet seldom be successfully challenged. Unreasonable exercise of power is intolerable, as intolerable as an *ultra vires* act. It is the purpose of this piece of research to show how unreasonable exercise of power can be checked.

I have purposely catalogued these activities, for the initiation of which I can myself claim no credit, for, in each case, the proposals for research were formulated by the students before they came to Cambridge, in order to emphasize the breadth of the field of public law.

² See *Law Quarterly Review*, April, 1947, for the other part of this lecture.

ENGLISH LEGAL AUTHORS BEFORE 1700

H. A. HOLLOND

THE following summary is based on notes compiled, like the commonplace books of old, for personal use. As the Editor was so good as to express the opinion that such a thing would be useful to the readers of this journal I have prepared it for publication.

My sources are mainly secondary. I have copiously referred to, and quoted from, Maitland¹ and Holdsworth.² I have also made much use of Professor Winfield's *Chief Sources of English Legal History*, published by the Harvard University Press in 1925, and Mr. J. D. Cowley's *Bibliography of Abridgments, etc., to the year 1800*, published by the Selden Society in 1932. I have turned constantly to the *Dictionary of National Biography*,³ and to the nine-volume edition of Foss's *Judges of England*.

Any classification of material according to centuries is arbitrary. I have placed Ellesmere, Coke and Bacon in the seventeenth century, because the more important parts of their public lives fell within it. And at the other end of the century I have included Roger North, because although he lived until 1734 his well-known work is the account of the lives of his three brothers, all of whom died before 1700. Whether to include in, or to exclude from, a select list a particular author whose importance may be regarded as on the border line is also a matter of personal judgment. I cannot expect everybody to agree with my selection.

I may add that Bacon, Selden and Zouche are among the twenty-six European lawyers of whom accounts are given in *Great Jurists of the World*, a volume of composite authorship edited by Macdonell and Manson, and published by John Murray in 1913.

TWELFTH CENTURY

1. *Glanville*. The author of the twelfth century classic, *Tractatus de Legibus et Consuetudinibus Regni Angliae tempore Regis Henrici Secundi*, is commonly described as Glanville, though what the treatise states in its title is that it was composed *justitiae gubernacula tenente illustri viro Ranulfo de Glanvilla juris regni et antiquarum consuetudinum eo tempore peritissimo*. It was finished between 1187 and 1189.

There was an early tradition that the great Glanville was himself the author, and the late Professor Beale, in his introduction to a reprint

¹ Maitland's brilliant *History of English Law before Edward I*, with which the name of Pollock is associated, is cited, according to practice, as P. & M.

² Holdsworth's *History of English Law*, in twelve volumes, is cited as *H. E. L.* Part of Holdsworth's work on the lives and writings of legal authors is reproduced in his *Sources and Literature of English Law*, Oxford, 1925, and in *Some Makers of English Law*, Cambridge, 1938.

³ Cited as *D. N. B.*

(1900) of an early nineteenth century translation by one John Beames, inclined to acceptance of the tradition. Maitland, however, expresses no leanings towards it; indeed, he offers an alternative conjecture that the book may have been written by Glanville's kinsman and secretary, Hubert Walter, himself afterwards justiciar, archbishop and chancellor, whom we know to have been renowned for legal learning, and to have had great influence on his master. For although tradition subsequently attributed to Glanville the invention of the assize of novel disseisin and the action of replevin, as well as legal authorship, there is no contemporary evidence of his being a trained lawyer. Maitland therefore guessed that 'perhaps later ages have ascribed to Glanville juristic attainments which in truth were those of his more clerkly kinsman and successor.'

Maitland tells us that Glanville came of a family which had held lands since the Conquest in East Suffolk, where he founded Leiston Abbey and Butley Priory. 'In 1174 being then sheriff of Lancashire and custodian of the honour of Richmond, he did a signal service to the king and the kingdom. At a critical moment he surprised the invading Scots near Alnwick, defeated them and captured their king. From that time forward he was a prominent man, high in the king's favour, a man to be employed as general, ambassador, judge and sheriff. In 1180 he became chief justiciar of England, prime minister, we may say, and viceroy. Henry seems to have trusted him thoroughly and to have found in him the ablest and most faithful of servants. Henry's friends had of necessity been Richard's enemies, and when Henry died, Richard, it would seem, hardly knew what to do with Glanville. He decided that the old statesman should go with him on the crusade. To Acre Glanville went and there, in the early autumn of 1190, he died of sickness.'⁴

The Latin text of the *Tractatus* has been re-edited (1932) by Professor Woodbine, of Yale. It contains about 45,000 words, and is divided into 14 *libri*, each with a number of *Capita*. It begins with four sections distinguishing criminal pleas and civil pleas. Criminal pleas are divided into (a) the more serious, including breaches of the king's peace, which are pleas of the crown, and (b) minor offences such as scuffles, blows and wounds, which belong to the jurisdiction of the sheriffs. Civil pleas are divided into (a) such as are determined in the King's Courts, and (b) such as fall within the jurisdiction of sheriffs. This is misleading because it leaves out pleas belonging to the courts of feudal lords. With this introduction the book proceeds to treat of procedure in the various classes of actions relating to land, and to matters closely connected with land such as advowsons and villeinage. He gives specimens of appropriate writs, seventy-five in all, beginning '*Rex vice-comiti salutem*': *vice-comes* (representative of the earl) being the Latin translation of 'sheriff.'

Liber 10, entitled *De debitis*, is of particular interest. *Debitis* may perhaps be paraphrased as 'legal duties,' for the author talks about the

⁴ P. & M. I, 163.

reciprocal obligations which arise out of various contracts, such as lending, sale and letting. But the words *debet* and *debitum* came to be associated exclusively with the writ of which Glanville gives a pattern in *Cap. 2*, '*Praecipe N ut juste et sine dilatione reddat R centum marcas quas ei debet ut dicit.*' This is the parent of the writ of debt, the primary function of which was the recovery of a fixed sum of money or a fixed quantity of fungibles.

Liber 10 ends with the statement that the author passes rapidly over contracts resulting from the agreements of private persons, because it is not the practice of the King's court to take cognizance of them.

THIRTEENTH CENTURY

2. *Henry of Bratton*, commonly called *Bracton*, was a Devonshire man, probably of Bratton Fleming. Date of birth unknown; died 1268. He often served as justice of assize and as justice *coram rege*. He was, like all the judges of his time, an ecclesiastic, and at the time of his death was chancellor of Exeter Cathedral, in the nave of which he was buried.⁵

He wrote a Latin treatise, about ten times as large as that of 'Glanville,' entitled *De Legibus et Consuetudinibus Angliae*, which is described by Maitland as 'the crown and flower of English medieval jurisprudence.'⁶ He also compiled, for use in preparing his treatise, a collection of about 2,000 cases which Maitland named *Bracton's Note Book*. These cases were extracted from borrowed plea rolls belonging to the judicial periods of Martin of Pateshull (c. 1220—1230) and William of Raleigh (c. 1230—1240), judges whom Bracton regarded as his masters and as greatly superior in calibre to his contemporaries. In 1258 the barons of the Exchequers were ordered to secure the return to the Treasury of the rolls which were in private hands. Many of those rolls still survive in the Public Record Office, and show the marks which were made to indicate to Bracton's copyists what they were to transcribe: firm, heavy lines, says Maitland, of a dark rusty-brown colour.

The *Note Book* was known 250 years after Bracton's death, for internal evidence shows that Fitzherbert used it when compiling his *Graunde Abridgment*. But its existence was subsequently forgotten, and it was not printed until 1887, when it was edited by Maitland from a copy which Vinogradoff had found in the British Museum three years before.

Of Bracton's treatise, *De Legibus Angliae*, Maitland has written, bracketing it with Blackstone's *Commentaries*, 'Twice in the history of England has an Englishman had the motive, the courage, the power to write a great readable, reasonable book about English law as a whole.'⁷ And, 'that Bracton's book on the laws of England is a good and a great book very worthy of careful study, is no novel opinion, but rather an

⁵ Holdsworth's account of Bracton in *H. E. L.*, Vol. II, pp. 232—290, is most valuable. Maitland has written about Bracton in two introductions, the first to *Bracton's Note Book*, the second to *S. S.* Vol. 8, *Bracton and Azo*.

⁶ *P. & M.*, I, 206.

⁷ *Bracton's Note Book*, Vol. I, pp. 1, 8 and 44.

old tradition which has stood the test and received the sanction of modern scholarship.'

After discussing the evidence as to when the book was written Maitland summed up as follows: 'The book seems to be the unfinished book of one who died in 1268, who for anything we know never published what he had written, who perhaps to the hour of his death hoped to resume his task and sometimes jotted down a new note in the margin of his manuscript, who in 1258 was deprived of the rolls that he had been using, who never revised his work as a whole after 1256, who was seriously engaged on it after 1250, who relied for his law chiefly on cases decided before 1240, who regarded such cases as *vetera judicia*. Why he left it unfinished we cannot say; perhaps the loss of the rolls was irreparable; perhaps his duties as a hard-worked judge left him no leisure; perhaps the voice of law was silenced by the clash of arms; perhaps sweeping innovations, such as the Provisions of Westminster, demanded changes in his text which he had not the energy to make; at present an answer could be no better than a hazardous guess.'

The Treatise is in 444 folios. The distribution of subjects shows how predominant was the land law in the thirteenth century. Folios 11—98b are concerned with feoffments, and folios 159 to the end with real actions. The treatise breaks off in the middle of an account of the writ of right.

There is a bad nineteenth century edition, with an unreliable translation, by Sir Travers Twiss, and there is a modern edition (1915—1942), without translation, by Professor Woodbine.

Bracton had studied Roman law both in Justinian's Institutes and in parts of his Digest and Code, and also in the two *Summae* written by Azo, the leader of the law school of Bologna, who died about 1230. Maitland, treating of the relation between Bracton and Azo, shows the statement made in Maine's *Ancient Law* that Bracton 'put off on his countrymen as a compendium of pure English Law a treatise of which the entire form and a third of the contents were directly borrowed from the *Corpus Juris*' to be a 'stupendous exaggeration.' 'Let us in the first place,' writes Maitland, 'abandon all talk about "putting off" . . . and in the second place admit that Bracton is only doing what plenty of other people have done, are doing, and will do in many parts of Europe. . . . He is assuming that Roman Law may be and ought to be used as subsidiary or supplementary law to fill the gaps in national or provincial custom.'⁸

Holdsworth, in his well-balanced account of Bracton's use of Roman law, brings out the following points. In regard to form the influence of Roman law was not far reaching. 'The fact that 87 out of the 107 folios of which the general part consists is taken up with the law of feoffments shows that he had English law and the needs of English lawyers chiefly in his mind, and . . . by far the greater part of the treatise is occupied

⁸ *Bracton and Azo*, pp. xxviii—xxix.

by the discussion of those forms of proceeding in the royal courts which were of the greatest practical importance at the time.'

In regard to terminology Roman expressions are used even where the substance is not Roman. To Roman terms 'Bracton no doubt sometimes gives meanings other than those which they had in Roman law. Sometimes he confessedly uses them only by analogy. But the manner in which they are used throughout the treatise perhaps shows us that Bracton often thought in the language of Roman law.' 'Even when he is dealing with purely English portions of his Treatise, and discoursing upon the assizes, the writs of entry, or the writ of right, Roman illustrations and phrases naturally recur to him.'

In regard to substance his study of Roman law led him 'to discuss problems which, when he wrote, were very far from any actual case argued in the royal courts. Thus he deals with *accessio*, *specificatio* and *confusio*; . . . similarly he deals with many questions relating to obligation and contract, fraud and negligence, about which the common law had as yet no rules. In dealing with these matters he necessarily uses Roman terms and borrows Roman rules.'

The success of Bracton's treatise was outstanding. 'We may doubt,' says Maitland, 'whether any book written by a medieval Englishman that was so bulky as Bracton's, and was not a book of devotion or theology, was more popular or more often transcribed.' And it was used as the basis of shorter books such as those of Fleta, Britton and Hengham.

There followed a decline. The Hundred Years War created a narrow patriotism, and taught English lawyers to regard Roman law as suitable only for Frenchmen and others whom they regarded as plainly inferior. And so in the fifteenth century some lawyers denied that Bracton's book had any authority.

Then came a revival. In the constitutional struggle of the seventeenth century Bracton was freely quoted. Coke was able, says Holdsworth, 'to use Bracton's work to liberalize English law, just as the parliamentary party used the doctrines to be found in Bracton touching the royal prerogative to show that the royal prerogative was subject to the law.'

Thereafter Bracton's authority was little questioned. Hale put the authority of his treatise on a level with that of the records of the courts. Sir John Holt, C.J.K.B. 1689—1710, imported into his judgment in *Ceggs v. Bernard*⁹ Bracton's adaptation of the Roman law of bailments. Blackstone includes Bracton among those whose treatises are cited as authority. And such citations have not been rare even in modern times.

3. *Fleta*. This is the name given to a small Latin treatise of about 1290, because the anonymous author so described himself. All that is known about him is that he was thoroughly familiar with the royal court and officials. The name suggests that the book may have been written during imprisonment in the Fleet prison.

⁹ (1703) 2 Lord Raymond, 909.

The book was not nearly so successful as that of Britton. Maitland described it as 'little better than an ill-arranged epitome of Bracton.' But it has had distinguished editors:—John Selden, in 1647, who prefixed a learned *Dissertatio historica*;¹⁰ and in 1735 Thomas Clarke, afterwards Master of the Rolls. A new edition is being prepared for the Selden Society by Mr. H. G. Richardson.

4. *Britton* (c. 1290) is the name by which a book of unidentified authorship, composed in Edward I's reign, is generally known. The editor of the modern edition¹¹ came to the conclusion that the author had at hand copies both of *Fleta* and of Bracton's treatise, and that he made more frequent use of the compendium than of the larger work.

Britton is written in French, which was the contemporary dialect of the Court and of the governing class. It is in the form of a code purporting to be promulgated by King Edward and beginning with a prologue addressed by the latter '*a touz ses feaus et sugez de Engleterre et de Hyre-launde*' (to all his lieges and subjects of England and Ireland). It appears from some remarks made in 1457 by Sir John Prisot, C.J.C.P., whom Coke described as a famous and expert lawyer,¹² that there was a tradition that Edward *fuit appurpos daver mis tout en certain et en escripture*, and had commissioned some of his judges to prepare a book or books. It seems a reasonable guess that *Britton* was one of such books. The work is divided into six books, the last being unfinished. The first book comprises thirty-two chapters, most of them concerned with the criminal law: three chapters only are devoted to civil actions of the personal class. The remaining five books are concerned with real actions and matters cognate thereto.

5. *Sir Ralph de Hengham* (d. 1311), author of *Summa Magna* and *Summa Parva*, was one of the last of the common law judges who were also ecclesiastics. He was the son of a Norfolk knight. He became C.J.K.B. about 1274. At the time of the judicial scandals of 1289 he was not one of the judges accused. But in 1290 he was dismissed and heavily fined. Such evidence as is available as to his offences suggests that they were trivial and that he was harshly treated. There was an improbable tradition that the cost of a clock-tower which stood in the yard of Westminster Palace until 1715 was defrayed out of Hengham's fine. When the tower was pulled down a sundial marked the place, bearing the motto *discite justitiam moniti*.

Hengham was re-employed in 1299, being appointed C.J.C.P. He held office until 1309.

¹⁰ The *Dissertatio ad Fletam* is an historical account in Latin of English medieval law books, and of the influence of the Roman and canon laws on continental and English legal development. It has been edited and translated by Mr. D. Ogg, Camb. Univ. Press, 1925.

¹¹ F. M. Nichols, 1865. See his *Introduction* for speculations as to the authorship of the book and a description of its contents.

¹² Reports, Part X, *Preface*. Coke states that Littleton was much helped by Prisot in the preparation of his *Tenures*.

He must have taken a prominent part in the preparation of the Statute of Westminster II, for it was stated fifty years later that he had drafted *Cap. 1 (De donis Conditionalibus)*,¹³ and he himself stated that he had made *Cap. 2*.¹⁴

Like his successor Bereford, J., he was a man of forthright speech in court. 'We forbid you,' he said to one counsel, 'on pain of suspension to speak further of that averment.' And to another, 'Leave off your noise, and deliver yourself from this account.' And to a third, 'That is a sophistry, and this is a place designed for Truth.'¹⁵

Tradition regarded Hengham as the outstanding legal author of his generation. His two *Summae*, which were accounts of the procedure in certain real actions, were so frequently copied that over seventy MSS. survive. They were edited by Selden. They are now available in an edition published in 1932 by Professor Dunham of Yale.¹⁶

There is some reason for attributing to Hengham two of four tracts on procedure published by Professor Woodbine. One of them is the *Judicium Essoniorum*, the law relating to the validity or invalidity of excuses for non-appearance, and the other the *Fet Assaver*, so called because of the recurrence of those words (meaning 'it is a fact to know,' *fait à savoir*) at the beginning of many paragraphs.¹⁷

Sir William Dugdale (1605—1686), the great antiquary, in his *Origines Judiciales* ascribed to Hengham the compilation of a new Register of writs.¹⁸

6. *The Mirror of Justices*. This book, of unknown authorship,¹⁹ is a curiosity, full of statements as to the law of the thirteenth century which are known to be untrue. But Coke acquired a MS. copy of it, and, possessing a credulity strangely incongruous with his ability, filled his *Institutes* with tales from it. It may well have been Coke's use of the work which led to its being printed for the first time in 1642. It must be mentioned both for this reason and because Maitland wrote one of his brilliant introductions for the Selden Society edition of it in 1893.²⁰

Internal evidence shows the book to have been written after the statutes of 1285, and possibly about the time of the judicial scandals of 1289. For the strain that runs through it is the dislike of the King's officers and their ways and the conviction that they were corrupt through and through. Maitland plausibly suggests that its fantasies may well form a cloud in which the author wraps up opinions that might bring him into danger. 'What then,' he writes, 'shall we say of this book? and

¹³ Y.-B. 15 Edw. III (R. S.) 392.

¹⁴ Y.-B. 33—35 Edw. I (R. S.) 83.

¹⁵ H. E. L., II, 550. See too S. S. Vol. 20, p. 196.

¹⁶ Camb. Univ. Press.

¹⁷ H. E. L., II, 324—326.

¹⁸ His authority is a MS. in the Cottonian Library. H. E. L., II, 514.

¹⁹ Maitland concludes that the evidence does not justify an ascription of authorship to Andrew Horn, fishmonger and Chamberlain of the City of London, though he is not completely cleared from suspicion.

²⁰ Vol. 7. The editor was W. J. Whittaker, whose personality and gifted talk made him much loved in Cambridge and in Lincoln's Inn.

what shall we call its author ? Is he lawyer, antiquary, preacher, agitator, pedant, faddist, lunatic, romancer, liar ? A little of all, perhaps, but the romancer seems to predominate. He would like that some of his tales should be believed. He hopes, as other romancers have hoped, to edify as well as to amuse his readers. But he is careful not to tell us when he is in earnest and when he is at play. So to do would not merely be an inartistic blunder: it might end in his being taken but too seriously. He is making an attack on powerful persons, on the king's justices and officers. He is hinting that the royal court is a den of thieves. It is well for him that, if called to account for his words, he can say that he was but telling stories of Alfred and Arthur, and ask you whether you cannot see a joke.'

THE FOURTEENTH CENTURY

7. The *Natura Brevium*²¹ is the best known of several anonymous tracts on procedure written during this century, which lacked legal authors. It was a selection of writs published with a commentary. It was printed in 1524. After the publication of Fitzherbert's *Natura Brevium* it was known as the *Old Natura Brevium*.

THE FIFTEENTH CENTURY

8. *William Lyndwood* (1375(?)—1446) was the author of *Provinciale*, the leading medieval book written on the canon law by an Englishman. The books read in England for the doctorate of canon law were for the most part foreign.

'According to the theory propagated by the canonists of the classical age there was a great mass of law which was common to the universal Church (*ius commune*). Some room was left for local variations. In the first place, a metropolitan might make statutes for his province, and a bishop might make statutes for his diocese, and these would be valid if they did not contradict law which proceeded from a higher source, in particular from the pope, and were in harmony with the first principles of ecclesiastical jurisprudence. In the second place, some respect was due to the customs of dioceses and provinces, provided that such customs were "prescript and laudable." Further, it was admitted that in certain cases a rule of statutory origin, even though it came from the apostolic see, might become obsolete, owing to non-observance. However, the space thus allowed for divergence from the *ius commune* was by no means very wide.'²²

Lyndwood's book, which was published by him in 1430 when he was the principal official of the Archbishop of Canterbury, is a glossed version of the constitutions given to the southern province by its metropolitans from the time of Stephen Langton downwards. Its object was to

²¹ Winfield, 279—285.

²² Extract from Maitland's article on *Canon Law*, written for Renton's *Encyclopaedia of the Laws of England*, 1897, and reprinted in *Collected Papers*, Vol. III. This article is a descriptive bibliography of the principal literature of the canon law.

harmonise these local statutes with the general system in the *just commune* of western Christendom. It must have been in demand for it was one of the earliest law books to be printed.

Lyndwood, a Lincolnshire man, was an undergraduate of Gonville Hall and a Fellow of Pembroke Hall, Cambridge. He migrated to Oxford and became a doctor of laws there. After taking orders and holding various ecclesiastical appointments, he had, from 1417 to 1441, a distinguished career as a diplomat, negotiating a great many truces and treaties on the Continent. He became Bishop of St. David's in 1441. He was one of the advisers of Henry VI in connection with the foundation of Eton College, and was placed by the king on the commission for framing statutes for King's College.

9. *Sir John Fortescue* (b. before 1395, d. c. 1479) (Lincoln's Inn),²³ was the son of a Devonshire knight; O.J.K.B. 1442. He was an active Lancastrian, joined the forces supporting Henry VI when Edward IV seized the throne, and was attainted. He went into exile in Scotland with Henry, who gave him the title of Chancellor. He then accompanied Henry's wife, Queen Margaret, and their son, Prince Edward, to France; Henry stayed and was captured. Fortescue negotiated the alliance of Queen Margaret with Warwick, which led to Henry's restoration in 1470. But Warwick was killed at Barnet, 14th April, 1471. Fortescue was captured at Tewkesbury, 4th May, 1471, and Prince Edward was assassinated. Fortescue then recanted, wrote an argument in favour of Edward IV's title, was pardoned and restored to his estates.

Fortescue is a figure of major importance in the history of political science,²⁴ and a pioneer of comparative legal study.

Much the most influential of his writings is his *De Laudibus Legum Angliae*, which was first printed in 1545—1546, and frequently republished, with translations from the original Latin, in the sixteenth and seventeenth centuries. An edition of 1616 was annotated by John Selden. Dr. S. B. Chrimes has produced a modern edition,²⁵ with a new translation, adding a short account of Fortescue's life, and a list of his works. The book was written in France, for the purpose of instructing Prince Edward in the general features of the laws of his country. The difference between an absolute and a limited monarchy is explained, and the common law is compared with the civil law, to the advantage of the former. It is well worth the while of a modern law student to spend half an hour reading the account of jury trial in Chapters 25 to 32, and of the Inns of Court and the serjeants at law in Chapters 49 and 50.

The prestige of this book even before it was printed is demonstrated by St. Germain's enthusiasm. And a century later Coke described it as

²³ Dr. Chrimes dismisses as legendary the tradition that Fortescue was an undergraduate at Exeter College, Oxford.

²⁴ Students of this subject should not miss the article published by Dr. Caroline A. J. Skeel, in *Transactions of the R. Hist. Soc., Third Series*, Vol. X (1910).

²⁵ (1942) Camb. Univ. Press.

‘worthy to be written in letters of gold for the weight and worthiness thereof.’²⁶

Among Fortescue’s other substantial writings the earliest is *De Natura Legis Naturae*, which had little permanent significance because it was not printed until the production, in 1869, of a complete edition of his works, by Lord Clermont, a descendant. The book was perhaps written while Fortescue was with Henry VI in Scotland. It is an examination, in Latin, of a problem of disputed succession to the throne, the contemporary relevance of which is obvious. Its title is due to the fact that the law of nature is considered, and selected as the law applicable to the dispute.²⁷

The Governance of England, or *Monarchia* was the first book written in English about law. It is uncertain whether it was composed for the advice of Henry VI in 1470, or of Edward IV in or after 1471. It compares the merits of absolute monarchy and constitutional government and contrasts contemporary France and England. But it was not printed until 1714. It has been much studied in modern times in Plummer’s scholarly edition.²⁸

Summing up the influence of Fortescue’s opinions in the fifteenth, sixteenth and seventeenth centuries, Holdsworth writes,²⁹ ‘Fortescue’s analysis of the causes of the weakness of the Lancastrian government is masterly. It led to practical suggestions, because it was not from books alone that Fortescue derived his inspiration. Without departing in any way from the constitutional position which he had taken up in the *De Laudibus*, he made suggestions which were carried out by the Tudors. At the end of the fifteenth century it was possible to advocate a strong executive founded upon the prerogative, and yet to believe in parliamentary control. It is for this reason that the practical influence of Fortescue’s works has been curiously double. They have enjoyed the rare distinction of having suggested both the measures which led to the establishment, in the sixteenth century, of the strongest monarchy which England had had since the time of the Norman and Angevin kings; and the arguments, which in the seventeenth century, were frequently and effectively used by the opponents to arbitrary rule.’

10. *Sir Thomas Littleton* (d. 1481) (Inner Temple), came of an old landed family in Worcestershire: his tomb is in Worcester Cathedral. He was a judge of the C.P. from 1466 to his death, his tenure being undisturbed by political events.

Littleton’s *Tenures* is a book which can fairly be called a masterpiece. It is an account, in 749 sections, roughly about 90,000 words—lucid and concise—of the common law of land tenures and estates in land as it was at the end of the middle ages. Coke vouches for its accuracy: he describes

²⁶ I owe the references to St. Germain and Coke to Skeel, *op. cit.*, pp. 90 and 93. *Doctor and Student*, Dialogue 2, Cap. 46; Coke’s *Reports*, Part VIII, Preface.

²⁷ For short summaries of this book, and of the others, see Winfield, 315–318.

²⁸ Oxford, 1885.

²⁹ *Sources and Literature of English Law*, 136–137.

it as 'a work of as absolute perfection in his kind, and as free from error as any book that I have known to be written of any human learning.'

It was written in Law French, professedly for the benefit of the author's son, Richard. Two manuscripts of it, in the Cambridge University Library, were almost certainly written before the author's death. It was printed in 1481 or 1482, being one of the earliest books printed in London, and the earliest treatise on the English Law printed anywhere. It is best known in the English version by an unknown translator, round which Coke's commentary is written. Before 1628, the date of publication of Coke's *First Institute*, there were more than seventy editions. There is a modern one³⁰ by Professor Eugene Wambaugh of Harvard, with a biography.

Littleton only concerned himself with the common law. He makes some casual references to 'uses,' but gives no account of the system, widely prevalent in his day, whereby, under the protection of the Chancellor, a landowner conveyed land to feoffees to hold to 'uses' either then specified or to be specified thereafter. Littleton himself conveyed some of his land in 1479 to feoffees to hold to such uses as he might declare by his will.

11. *Nicholas Statham* is the reputed author of the fifteenth century Abridgment of the Year-Books which is called by his name. There was such a man who was a governor of Lincoln's Inn at several times, and became Lent Reader there in 1471; it is possible that he was identical with the Nicholas Statham who received a reversionary grant of the office of second baron of the Exchequer in 7 Edw. IV.³¹

In order to facilitate reference to the Year-Books it was essential that there should be indexes of some kind. At an early date someone hit upon the idea of grouping abstracts of cases of a particular period under the head of the form of legal procedure to which they belonged. There are two MSS. in Lincoln's Inn Library, and one in the British Museum, all in a hand of Edward II's reign, which show such a scheme in operation for the cases of Y.-B. 30 and 31 Edw. I.³²

Statham's Abridgment was a similar work, in Law French, on a larger scale. It was printed in Rouen in 1588 or soon afterwards by Guillaume le Talleur for Richard Pynson.³³ It has 258 titles, in a roughly alphabetical order, the titles being usually the names of writs. The number of items grouped under these titles is about 3,750, an item being either a précis of a case or merely a note of one point in a case. Professor Winfield's account³⁴ of the subject-matter shows that its arrangement is exceedingly unsystematic.

Professor Winfield concludes his account of *Statham* with a translation

³⁰ (1903) Washington, D. C.

³¹ For details as to the evidence of authorship, see Winfield, 206—214.

³² Winfield, 205.

³³ An English translation was produced in 1915 by an American lady, M. C. Kingsmill, in 2 vols., published by Boston Book Co.; Winfield, 214.

³⁴ Winfield, 217—218.

of the last item under the heading 'Toll.' 'The miller of Matlock took toll twice, because he heard the rector of the same vill say on Palm Sunday, "Tolle, Tolle" (Away with him! Away with him!).'

THE SIXTEENTH CENTURY

12. *Sir Anthony Fitzherbert* (1470—1538) (Oxford(?) and Gray's Inn(?)) came of a Derbyshire family. He was a justice of the C.P. 1522—1538. He was, one reads with regret, a member of the courts which tried the Carthusians, Fisher and More. Professor Winfield rightly calls him 'one of the towering figures in the history of English legal literature,' for his output was prodigious: his major works being the *Graunde Abridgment*, with the *Tabula of the Graunde Abridgment*, and the *Natura Brevium*. He wrote other books too,³⁵ on law and agriculture.

The *Graunde Abridgment*, in Law French, is the third of the four printed abridgments of the Year-Books.³⁶ Its first issue, from the press of John Rastell, was probably in 1516. There were four further editions in the next seventy years.

The use of the Abridgment was made more manageable by the publication in 1517 of a *Tabula*, a rudimentary kind of index, the preparation of which was shared between Fitzherbert and John Rastell.³⁷

Fitzherbert's work must not be regarded as merely a collection of abstracts of Year-Book cases. 'It took in,' writes Professor Winfield, 'scores of cases which never found their way into the printed Year-Books, and it is, at the very least, to be bracketed as a primary authority with them for many other cases. It differs from them and often improves on them by avoiding the foolish blunders which they contain. A point missed or muddled in the Year-Books may be made clear by Fitzherbert or Brooke, and their Abridgments are quite as much collateral reports as condensations of cases.'

Fitzherbert's *Natura Brevium*, originally written in Law French, was commonly called the *New Natura Brevium* to distinguish it from the *Natura Brevium* of Edward III's reign. Like its predecessor it was a selection of writs, with commentary. The fact that the earlier work had become inadequate is given by Fitzherbert as his reason for composing and publishing his own book. The first edition was in 1534; it was followed by a second in 1537. The classic edition is that of 1730, in English, in which were incorporated the annotations of Sir Wadham Windham, a seventeenth century judge, and of Sir Matthew Hale.³⁸

³⁵ Foss, Vol. V, 169, gives the following list: *The Office and Authority of Justices of the Peace*; *The Office of Sheriffs, Bailiffs of Liberties, Escheators, Constables, and Coroners*; *The Diversity of Courts*; *Of the Surveying of Lands*; *The Book of Husbandry*. But Holdsworth says (*H. E. L.*, IV, 212, note ²) that there seems to be no sufficient ground for attributing *The Diversity of Courts* to Fitzherbert.

³⁶ The first was *Statham*: the second, the *Year-Books of Assizes Abridged*, 1509 or 1510, possibly by Sir William Callow, J.; the fourth, *Brooke*, Winfield, 200—237.

³⁷ Cowley, pp. xlvii, xlviii.

³⁸ Hale recommended it as one of the first books for students. Preface to Rolfe's *Abridgment*.

13. *Christopher St. Germain* (c. 1460—1540) (Oxford—Exeter College(?), and Inner Temple) was the son of a Warwickshire knight. He was eminent as a barrister and as a collector of legal books. His famous work, *Doctor and Student*, consists of two dialogues between a Doctor of Divinity and a Student of the Common Law. The first dialogue was published by John Rastell in 1523, in Latin; no copy of this edition has survived, but we have a reprint of 1528. The second dialogue was published in English in 1530. An edition of the first dialogue, with variations, was published in English in 1531. The two dialogues were subsequently reprinted together again and again in English. The last editions are those of William Muchall in 1787 and 1815. The absence of a modern edition is a reproach to legal scholarship: fortunately Professor Plucknett is engaged upon the preparation of one.

An account of this work and of its influence was given by Vinogradoff in 1908.³⁹ He shows how the concept of 'equity,' entertained by chancellors and common lawyers alike in the sixteenth century, was derived from the Canon Law. This concept was narrower than that of the earlier common lawyers, which included in its scope abstract justice and analogy. St. Germain takes his definition of 'equity' from the *Regulae morales* of the eminent French theologian, Jean de Gerson (1363—1429), who bases himself on Aristotle. Gerson's words⁴⁰ are, '*aequitas quam nominat philosophus (=Aristotle) epikeiam (sic)*⁴¹ *praeponderat juris rigori. Est autem aequitas justitia pensatis omnibus circumstantiis particularibus dulcore misericordiae temperata.*' Equity is the standard by which general rules are adjusted to particular cases. Gerson's statement is not original: it is a commonplace of fourteenth century speculation. The Italian jurist Luca da Penne (c. 1320—c. 1390) uses the same words, '*aequitas est justitia dulcore misericordiae temperata.*'⁴² But a definition of equity does not tell us how to ascertain what is equitable in the particular case. Aristotle did not help here. It was a contribution of the canonists to introduce the notion of conscience.

Vinogradoff does not make the obvious point that consciences vary indefinitely, and that the answer to the question whether *B* should or should not be held bound to certain conduct in a Court of Equity, cannot depend on the answer to the question what orders the still small voice of *B*'s conscience gave to him. And therefore it is for the Chancellor to determine what the dictate of conscience ought to be in the particular case. And so we conclude that it is the Chancellor's conscience which is the real standard, and the recognition of this fact leads to Selden's famous dictum, quoted below (p. 316).

Holdsworth described St. Germain as the first of the founders of the

³⁹ In a paper read at the Berlin Historical Congress, and printed in the *L. Q. R.*, October, 1908. It is in Vol. II of Vinogradoff's *Collected Papers*, p. 190.

⁴⁰ Quoted, Vinogradoff, p. 192.

⁴¹ A mistake for *epikeiam*.

⁴² In his commentary on Books X, XI, XII of Justinian's *Code*. See Ullmann, *The Ideal Idea of Law*, 1946, p. 41.

English system of equity, and Sir Thomas More as the second.⁴³ St. Germain earns his title owing to the two accidents, that the Canon Law, effectively discouraged by Henry VIII, ceased to be taught in England, and that after 1529 the Great Seal was held by only four ecclesiastics, during about ten years in all.⁴⁴ It was therefore from *Doctor and Student*, on which all lawyers were brought up, that Lord Chancellors and Lord Keepers learned the theoretical basis of their equitable jurisdiction.

14. *Sir Thomas More*⁴⁵ (1478—1535) (Canterbury Hall, Oxford, and Lincoln's Inn), L.C., 1529—1532, is mentioned although he did not write about law, because he holds a secure place in the history of European letters. He wrote voluminously in Latin and in English—some history and much theology.

His father, Sir John More, a judge of the K.B., who came of a family with property in Hertfordshire, lived to see his son Chancellor. It is recorded of Sir Thomas that 'whensoever he passed through Westminster Hall to his place in the Chancery by the court of King's Bench, if his father, one of the judges there, had been set ere he came, he would go into the same court, and there reverently kneeling down in the sight of them all, duly ask his father's blessing.'⁴⁶

More's world famous *Utopia* was written in Latin in 1515—1516; the text was published in six continental cities before it appeared in England. An English translation was published in 1551, subsequent to German, Italian and French versions.

It may be noted that More's views about punishment as expressed in *Utopia* are most liberal and humane.

Holdsworth claims for More a place with St. Germain among the founders of Equity, on the ground that when he heard that judges were still critical of the practice of the Chancery to grant injunctions against suitors availing themselves unconscionably of common law remedies, he asked them to dine with him, and tried to explain the principles of equitable intervention. It is alleged by his son-in-law, Roper,—one wonders how truly—that he convinced them that such intervention was necessary so long as the rigours of the common law remained unreformed. At any rate by his reasonableness he established for a time harmonious relations between Chancery and the judges.

The late Professor R. W. Chambers' *Thomas More*, published in 1935, is a really great biography of one of the ablest and most saintly of men.⁴⁷

15. *John Rastell* (d. 1536) (Oxford(?) and Lincoln's Inn) was a Londoner by birth. He had at one time a large legal practice and was also one of

⁴³ *Some Makers of English Law*, 95—99.

⁴⁴ Bishop Thomas Goodrich, Dec. 1551—Aug. 1553; Bishop Stephen Gardiner, Aug. 1553—Nov. 1555; Archbishop Nicholas Heath, Jan. 1556—Nov. 1558; Bishop John Williams, July 1621—Nov. 1625.

⁴⁵ *H. E. L.*, II, 222—224; *Some Makers of English Law*, 99.

⁴⁶ From the *Life of More* by his son-in-law Roper: quoted *H. E. L.*, V, 341—342.

⁴⁷ More was canonized by the Roman Catholic Church about 400 years after his execution.

the leading printers of his day. He married Elizabeth More, sister of Sir Thomas. He was a pioneer of colonization, and in 1517 made the first English attempt to found a settlement in North America.⁴⁸ It came to nothing because he had to turn back owing to a mutiny on his ship. At the end of his life he was a member of Parliament. In 1536, perhaps because of attacks made by him on the tithe law and of his connection with More, he was thrown into prison.⁴⁹ There he died.

He compiled, and printed in 1527, the first law dictionary proper, containing definitions of words in alphabetical order. The title was in Latin, *Expositiones terminorum legum anglorum*. The text was, as he tells us himself in the preface to what was probably the second edition, printed about 1530, first written in French, and then translated by him into English. The sixteenth (1624) and subsequent editions were entitled *Les termes de la Ley*, and this is the title by which the work has since been known. At the end of the sixteenth century it was wrongly attributed to John Rastell's son, William, and this attribution was repeated in Coke's preface to Part X of his *Reports*.

The last English edition was in 1742: there is an American one of 1812, reprinted in 1819.⁵⁰

Rastell's work as a law printer was most important: his collaboration with Fitzherbert has been noted (*ante*, p. 303).

16. *William Rastell* (1508-1565) was the son of John Rastell and Elizabeth More. After being educated at Oxford he went into his father's printing business and in 1531 issued the first printed edition of the *Register of Original Writs* and the *Register of Judicial Writs*, in a single volume. He joined Lincoln's Inn just after his uncle's resignation from the Chancery in 1532, but continued his father's business for a time. After giving up printing he edited books in addition to legal practice. His best known publications are (1) *A collection of all the statutes from the beginning of Magna Carta unto the year of our Lord, 1557*; (2) *The Works of Sir Thomas More in English*, 1557; (3) *Liber Intrationum* (Book of Entries), 1564. 'Entries' mean precedents of pleadings in the form in which they were to be entered on the roll. This was in Latin until the statute of 1731. Rastell states in the preface that none of the precedents were of his own making: he mentions his sources, one of which was a collection made by a prothonotary, another a collection owned by his grandfather Sir John More, J. but not made by him.

Rastell, who was a Catholic, became a judge of the Q.B. in the last year of Mary's reign: he remained in office during the first years of Elizabeth's, but left the country in 1563 to join his co-religionists in exile, and died at Louvain.⁵¹

⁴⁸ Chambers' *Thomas More*, 140.

⁵⁰ See Cowley's Introduction.

⁴⁹ D. N. B.

⁵¹ There is much information about the Rastells, father and son, in *Early Tudor Drama*, by A. W. Reed, and in *Thomas More*, by R. W. Chambers.

17. *Sir Robert Brooke* (d. 1558) (Oxford and Middle Temple) came of a Shropshire family. He was a judge with a great reputation for learning and integrity. His Chief Justiceship of the C.P. (1554—1558) fell entirely within the reign of Mary: he was knighted by King Philip.

His *Abridgment*, posthumously published in 1568, is in Law French, on the same scale as Fitzherbert's, with the addition of material that had accumulated since the publication of the *Graunde Abridgment*. There are just over 20,700 items in *Brooke*, but the increase in the number of items compared with the number in *Fitzherbert* is not entirely due to additional material. There was some sub-division of longer cases, and some repetition of the same point under different headings.

Professor Winfield quotes the following comparison of the two works from a book dated 1600.⁵² 'Mast. Brooke is more polite, and by popular and familiar reasons hath gained singular credite, and in the facilitie and compendious forme of abridginge cases hee carieth away the garland. But where Ma Fitzherbert is better understood, he profiteth more, and his Abridgment hath more sinewes, though the other hath more vaines.' In other words, Brooke has a better style and greater facility in condensing cases, but Fitzherbert on a close analysis displays greater intellectual power. The last editions of both these abridgments were in 1586.⁵³

Brooke also wrote readings which he gave as Reader at the Middle Temple on the Statute of Limitations, 32 Hen. VIII c. 2, and on Magna Carta c. 16. These were published in 1647.⁵⁴

18. *Sir Thomas Smith* (1513—1577) (Queens' College, Cambridge)⁵⁵ was the author of a little descriptive book, *De Republica Anglorum*, which was posthumously published in 1583 and became one of our constitutional classics. Although it had a Latin title it was written in English. A Latin translation was made by John Budden, Regius Professor of Civil Law at Oxford, for the benefit of foreign readers, and was published about 1610.

The *De Republica* was written in France without books of reference, while Smith was ambassador. He states his object to be to 'declare summarily as it were in a chart or map, . . . the form and manner of the government of England, and the policy thereof, and set before your eyes the principal points wherein it doth differ from the policy or government at this time used in France, Italy, Spain, Germany, and all other countries, which do follow the civil law of the Romans, compiled by Justinian into his *Pandects* and *Code*.' He pays particular attention to the courts of law and the various types of procedure used in them. To the edition of 1589 some useful notes were added on the officials employed in the various courts.⁵⁶

⁵² William Fulbeck, *Direction to the Study of the Laws*, 27, 28, quoted Winfield, 233.

⁵³ *H. E. L.*, II, 545.

⁵⁴ *H. E. L.*, V, 394.

⁵⁵ A biography of Smith was written by John Strype, 1643—1737. There is a life in the *D. N. B.* by A. F. Pollard, and an account of Smith's academic career in Mullinger's *History of the University of Cambridge*.

⁵⁶ Appendix A in Alston's edition, 1906.

Few Englishmen who have started their careers as dons have played so many parts in public life. My excuse for giving him a disproportionate amount of space is that I wish to quote Maitland's words about him. In his preface to Alston's edition, published in 1906, Maitland wrote:⁵⁷ 'Thomas Smith was born at Saffron Walden in 1513. In 1526 he entered Queens' College, Cambridge. At the beginning of 1530 he was elected a fellow of that college, being then B.A. He graduated M.A. in 1533 and shortly afterwards began to lecture on Greek. In 1538 he became public orator of the University. It was at this time that he won the honourable place that he holds in the history of scholarship by endeavouring in concert with his friend John Cheke to introduce the "Erasmian" method of pronouncing the Greek language; but he was also paying attention to Roman law. In 1540 King Henry founded the five regius professorships, and the chair of civil law was given to Smith. He went abroad to study and became a doctor in law of the University of Padua; also he saw something of the French universities, in which Roman jurisprudence was beginning to shake off its medieval garb. As in the case of scholarship, so in the case of law, he was on the side of the reformers, and he returned to speak with enthusiasm to a Cambridge audience of the work that was being done by Andrea Alciato and Ulrich Zasius. In religion also he was with the reformers. He became chancellor to Goodrich, Bishop of Ely. In 1546 he was ordained priest, and he held the rectory of Leverington in Cambridgeshire. Shortly after the accession of Edward VI, he entered public life and the service of the Protector Somerset. He became clerk of the Privy Council, steward of the Stannary Court, a master of the Court of Requests, provost of Eton, dean of Carlisle, and in 1548 one of the two secretaries of state. The fall of the Protector, to whom he had been faithful, brought some trouble upon him. He was deprived of the secretaryship and the professorship. Mary's accession brought further trouble. A married priest, he had to resign Eton and Carlisle, but from any worse fate than a life in retirement he seems to have been shielded by Stephen Gardiner, who, it is said, had reason to be grateful to him for similar services performed in King Edward's reign. When Mary died, he once more emerged. In 1562 he was sent as Elizabeth's ambassador to France and there he remained until 1566 during a stormy time. While in France he wrote the little treatise that is here printed. He was admitted to the Privy Council in 1571 and once more became a secretary of state in 1572. He represented the county of Essex in the parliament of that year and became chancellor of the order of the garter. His health failed in 1576 and he died on the 12th of August, 1577.'

'Altogether it is a remarkable career. Few Englishmen have held so many offices of such different sorts. Among his contemporaries his reputation for learning stood high. Not only was he regarded as an

⁵⁷ Pp. viii—xi.

erudite "Grecian," but he knew something of Hebrew and the modern tongues. Not only was he regarded as an eminent and enlightened "civilian," but he was accounted a master of history and mathematics and natural philosophy.'

And in his brilliant Rede lecture,⁵⁸ *English Law and the Renaissance*, Maitland epitomizes Smith's career:—

'Then we observe that not long after Pole⁵⁹ had been advocating a Reception, his cousin King Henry, whose word was law supreme in church and state, prohibited the academic study of one great and ancient body of law—the canon law—and encouraged the study of another—the civil law—by the foundation of professorships at Oxford and Cambridge. We observe also that his choice of a man to fill the chair at Cambridge fell on one who was eminently qualified to represent in his own person that triad of the three R's—Renaissance, Reformation and Reception. We know Professor Thomas Smith as a humanist, an elegant scholar with advanced opinions about the pronunciation of Greek. We know the Reverend Thomas Smith as a decided, if cautious, protestant whose doings are of some interest to those who study the changeful history of ecclesiastical affairs. Then we know Dr. Thomas Smith as a doctor in law of the university of Padua, for with praiseworthy zeal when he was appointed professor at Cambridge he journeyed to the fountain-head for his Roman law and his legal degree. Also he visited those French universities whence a new jurisprudence was beginning to spread. He returned to speak to us in two inaugural lectures of this new jurisprudence: to speak with enthusiasm of Alciatus and Zasius: to speak hopefully of the future that lay before this conquering science—the future that lay before it in an England fortunately ruled by a pious, wise, learned and munificent Prince. Then in Edward VI's day Thomas Smith as a Master of Requests was doing justice in a court whose procedure was described as being "altogether according to the process of summary causes in the civil law" and at that moment this Court of Requests and other courts with a like procedure seemed to have time, reason and popularity upon their side. Altogether, the Rev. Prof. Dr. Sir Thomas Smith, Knt., M.P., Dean of Carlisle, Provost of Eton, Ambassador to the Court of France and Secretary of State to Queen Elizabeth was a man of mark in an age of great events. Had some of those events been other than they were, we might now be saying of him that he played a prominent part in Renaissance, Reformation and Reception, and a part characteristic of that liberal and rational university of which he was professor, public orator and vice-chancellor.'

19. *Edmund Plowden*⁶⁰ (1518—1585) (Cambridge and Middle Temple) came of a prominent Shropshire family. He is described by Holdsworth

⁵⁸ Published in the year of its delivery, 1901, by the Camb. Univ. Press. Reprinted in Vol. I of *Select Essays in Anglo-American Legal History*, 1907.

⁵⁹ Reginald Pole, 1500—1558, Cardinal 1536, Archbishop of Canterbury 1556—1558

⁶⁰ *H. E. L.*, V, 372. Veeder, *The English Reports*, Harvard L. R. Vol. 15, pp. 1—24, and *Essays in Anglo-American Legal History*, Vol. II, pp. 128—130.

as perhaps the most learned lawyer in a century of learned lawyers: it was said of him that he might have been Lord Chancellor had he not been a Catholic. He wrote, in Law French, reports for his own use of cases heard in the K.B., C.P., and Exch., during the years 1549—1578. He felt obliged to publish them because he learned that there was a danger of a pirated publication based on faulty copies. He issued Part I in 1571 and Parts I and II in 1578, under the title *Reports or Commentaries*.

Plowden took infinite pains to render his work accurate and complete. He set out clearly the points at issue, the arguments of counsel and the grounds of the judgment. He was sparing of personal comment, and careful to separate his own views from the opinion of the court, thereby setting an example which Coke unfortunately did not follow.

Plowden's *Commentaries*, as they are generally called, have received unstinted and unqualified praise. Coke described them as 'exquisite and elaborate,' and later generations have concurred. They were translated in the eighteenth century.

THE SEVENTEENTH CENTURY

20. *Sir Thomas Egerton* (1540—1617) (Brasenose College, Oxford, and Lincoln's Inn) was the illegitimate son of a Cheshire knight, as a member of whose family he was brought up. He became S.-G., 1581; A.-G., 1592; M.R., 1594; L.K., 1596 (remaining M.R. until 1603); L.C., as Baron Ellesmere, 1603; Viscount Brackley, 1616.

His ability and good looks made him universally admired by his contemporaries. He is now remembered principally as a protagonist in the controversy with Coke and the common lawyers as to whether it was illegal under the statutes of *praemunire*, or any other statute, for the Court of Chancery to issue an injunction forbidding a successful litigant at common law to obtain execution of the judgment in his favour. The controversy ended with a pronouncement made by James I in July, 1616, in favour of the Court of Chancery.

Ellesmere, as he is generally called, is known to have been to some extent a legal author. He left to his chaplain, John Williams, afterwards L.K., a number of manuscripts 'for the well ordering of the High Court of Parliament, the Court of Chancery, the Star Chamber, and the Council Board.' But these had disappeared before the end of the seventeenth century.⁶¹

There are some published tracts on the court of chancery and the office of lord chancellor, and some *Observations on Coke's Reports*, which are often referred to as of his authorship, but there seems to be no justification for the attribution.⁶²

He published, at the King's command, the speech which he made in the Exchequer Chamber in 1606 in the collusive action known as *Calvin's*

⁶¹ John Hacket in his life of Williams, 1693, says: 'These notes I have seen, but are lost, as it is to be feared, in unlucky and devouring times.' Quoted *H. E. L.*, V, 235, n. 2.

⁶² *H. E. L.*, V, 234—235, 271—273, 478.

Case, or the *Case of the Post Nati*,⁶³ which decided that a person born in Scotland since the accession of James to the crown of England was not an alien in England.

We also have a report of his judgment in the *Earl of Oxford's Case*,⁶⁴ one of the cases which led to the conflict with Coke.

There is now in the Huntington Library, in California, a collection of manuscripts which belonged to Ellesmere. One of them is *A Discourse upon the Exposition and Understanding of Statutes*, written in English, which is of great importance as being the earliest work by an Englishman on this subject. It has been edited by Professor S. E. Thorne of the Northwestern University Law School,⁶⁵ with an introduction treating of the problems relating to the interpretation of statutes between the fourteenth and seventeenth centuries. The date of composition probably lies between 1563 and 1567. Opinion differs as to the likelihood of the discourse being a youthful work of Ellesmere's; Professor Plucknett argues in favour of his authorship.⁶⁶

21. *Sir Edward Coke*⁶⁷ (1552—1634) (Norwich Grammar School, Trinity College, Cambridge, and Inner Temple) was the son of a barrister belonging to a Norfolk family.

He was engaged in public life in four capacities. First, as a Law Officer, 1594—1606. As such he showed brutality, excessive even for his time, towards political prisoners. Secondly, as a Chief Justice; C.J.C.P., 1606—1613; C.J.K.B., 1613—1616. As such he was arrogant and unscrupulous in his attacks on the jurisdictions of the Court of Admiralty, the ecclesiastical courts, and the Court of Chancery. But he resisted the royal prerogative when it seemed to encroach upon the independence of the common law courts, and this courageous stand led to his dismissal. Thirdly, as a Councillor out of office, 1616—1620. As such he was undignified in his manoeuvres for preferment; for instance, he kidnapped his child daughter, Frances, from her mother, and forced her to marry Buckingham's brother, John Villiers (later Viscount Purbeck). Fourthly, after abandoning hope of office, he became a Parliamentary leader, 1620—1629, the climax of his career being the part which he played in drafting and presenting the Petition of Right. He then retired to his house at Stoke Poges, where he died.

Coke's principal writings, which have given him a pre-eminent authority in English legal history, are (1) his *Reports*, (2) his *Institutes*.

Coke's *Reports*, Parts I to XI, were published at intervals between 1600 and 1615.⁶⁸ Parts XII and XIII are of less authority because

⁶³ Lord Campbell gives some account of this case in his *Lives of the Lord Chancellors*.

⁶⁴ 1 Chancery Reports, 1—16.

⁶⁵ 1942, Huntington Library, San Marino, California.

⁶⁶ *L. Q. R.*, July, 1944.

⁶⁷ *H. E. L.*, V, 423—493. It is surprising, in view of the dramatic character of Coke's life that no standard biography of him has been written. A popular biography, written by Hastings Lyon and Herman Block of the New York bar, was published by Houghton Mifflin Co., U.S.A. in 1929. Unfortunately it gives no references.

⁶⁸ Professor Plucknett has accounted for the irregular distribution of Coke's material in *The Genesis of Coke's Reports*, *Cornell Law Quarterly*, Feb. 1942.

they were not revised by him, and were published after his death. His treatment of cases is not uniform. Sometimes he makes a case a peg on which to hang a summary of the law on the matter in hand. Sometimes he reports a series of cases on a particular topic concisely, sometimes a single case elaborately. But the place which his reports took in the legal apparatus of the age was supreme. It is well described by Coke's lifelong opponent, Bacon, who wrote of them that 'though they may have errors, and some peremptory and extra-judicial resolutions more than are warranted, yet they contain infinite good decisions and rulings over cases' and that 'had it not been for Sir Edward Coke's Reports the law by this time had almost been like a ship without ballast; for that the cases of modern experience are fled from those that are adjudged and ruled in former times.'

Of the *Institutes*, the *First*, *Coke upon Littleton*, was published in 1628: the others in 1641, namely, the *Second*, a commentary on 39 statutes relating to Public Law; the *Third* on Criminal Law; and the *Fourth* on the jurisdiction of the Courts.

Coke upon Littleton is the most famous of the *Institutes*. Although it is in form a commentary on Littleton's *Tenures*, it goes far beyond the scope of that work. Holdsworth describes it as 'a legal encyclopaedia arranged on no plan, except that suggested by the words and sentences of Littleton.'⁶⁹ The classic edition is that of 1787, begun by Francis Hargrave⁷⁰ (c. 1741—1824) and finished by Charles Butler⁷¹ (1750—1832). It incorporates the notes of Sir Matthew Hale and the Earl of Nottingham.

Among Coke's minor works the best known are *The Complete Copyholder* (posthumously published, 1650), and his *Book of Entries* (1614). 'Good pleading,' he wrote in his preface to the latter, 'is the touchstone of the true sense of the law.' All his precedents of pleadings were taken from cases which had recently come before the courts. To some of them he added short notes. His collection was curiously conservative: for instance, in spite of his anxiety to secure commercial business for the common law courts, he included no declaration on a bill of exchange, though Rastell had supplied a precedent of such a pleading fifty years before.

A balanced estimate of Coke must admit his intellectual onesidedness. He was a lawyer first and last. 'As regards very old times,' wrote Maitland, 'little that was of real value came from the imperious dogmatist who dominated the jurisprudence of his time. When he was on unfamiliar ground Sir Edward Coke was, of all mankind, the most credulous. There was no fable, no forgery, that he would not endorse; and a good

⁶⁹ *H. E. L.*, V, 467.

⁷⁰ Hargrave was a great friend of Lord Thurlow and devilled for him. His fine collection of legal MSS. is in the British Museum. He published a number of writings by deceased lawyers in *Law Tracts* and in *Collectanea Juridica*.

⁷¹ Butler was a real property lawyer of the highest eminence, who was the first Roman Catholic to be called to the bar in pursuance of the Catholic Relief Act, 1791.

many medieval legends and medieval lies passed into currency with his name upon their backs.'⁷² But upon any question how the law stood in his day Coke's authority has reigned supreme. And many propositions stated by him as opinion have become law by judicial acceptance. In 1824, referring to a quotation from Coke, Best, C.J.C.P., said:⁷³

'The fact is Lord Coke⁷⁴ had no authority for what he states, but I am afraid we should get rid of a good deal of what is considered law in Westminster Hall if what Lord Coke says without authority is not law. He was one of the most eminent lawyers that ever presided as a judge in any court of justice, and what is said by such a person is good evidence of what the law is, particularly when it is in conformity with justice and common sense.'

Charles Butler wrote, in his *Reminiscences*,⁷⁵ that 'the most advantageous, and perhaps the most proper point of view, in which the merit and ability of Sir Edward Coke's writings can be placed, is by considering him as the centre of the modern and ancient law.' Butler admits that there have been material alterations in the legal system since medieval times, but adds that they have been effected 'not so much by superseding, as by giving a new direction to the principles of the old law, and applying them to new subjects. Hence a knowledge of ancient legal learning is absolutely necessary to a modern lawyer. Now Sir Edward Coke's commentary upon Littleton is an immense repository of everything that is most interesting or useful in the legal learning of ancient times. Were it not for his writings we should still have to search for it in the voluminous and chaotic compilation of cases contained in the Year Books, or in the dry, though valuable, abridgments of Statham, Fitzherbert, Brooke and Rolle.'

And Sir James Fitzjames Stephen, a judge of the High Court, 1879—1891, wrote in his *History of the Criminal Law*:⁷⁶ 'Coke's *Institutes* have had a greater influence on the law of England than any other work written between the days of Bracton and those of Blackstone. When the older learning became obsolete, Coke came to be regarded more and more as a second father of the law behind whose works it was not necessary to go.'

22. *Sir Francis Bacon*⁷⁷ (1561—1626) (Trinity College, Cambridge, and Gray's Inn) was a son of Sir Nicholas Bacon, L.K., 1558—1579, a member of an old landed family in Suffolk. Francis' mother, the second wife

⁷² Maitland, *Collected Papers*, III, 453.

⁷³ *Garland v. Jekyll*, 2 Bingham, 296. William Draper Best, 1767—1845, was C.J.C.P., 1824—1829; Cr. Baron Wynford on Retirement.

⁷⁴ Coke was never a peer. A number of eminent judges used by custom to be referred to by their surnames with the prefix Lord. *E.g.*, Bacon was often called Lord Bacon though his titles were Baron Verulam, and Viscount St. Albans. And Sir John Holt, C.J.K.B., 1689—1710, was often called Lord Holt.

⁷⁵ Vol. I, 116.

⁷⁶ Vol. II, 205.

⁷⁷ Many lives of Bacon have been written. The two most recent are by Charles Williams (1932) and Mary Sturt (1932). The classic life is that by James Spedding (1808—1881) published with Bacon's letters in 7 vols. (1861—1874). Spedding (with R. L. Ellis and D. D. Heath) also edited the works of Bacon in 7 vols. (1857—1879).

of Sir Nicholas, was Anne Cooke, sister of the second wife of Lord Burghley, the Treasurer.

The first half of Bacon's public life, under Elizabeth, was occupied largely with ineffective striving after promotion, which led him even to take an active part in the prosecution (1601) of Essex, who had been his friend and benefactor. With James I he was successful and became S.-G. in 1607, A.-G. in 1613, in 1617 L.K., in 1618 L.C. with the title Baron Verulam. In 1621 he was created Viscount St. Albans, but within a few weeks was impeached for taking bribes, confessed his guilt, and was sentenced to a heavy fine and imprisonment. His last illness was brought about by exposure to cold while stuffing a fowl with snow by way of experiment in refrigeration.

Bacon probably surpasses in intellectual brilliance any man who has attained high judicial office. Few literary works have been read as widely as his *Essays*, some of which were first published in 1597; as the author of the *Advancement of Learning* (1605) he has secured a place of 'permanent importance as the founder of modern inductive method, and the pioneer in the attempt at logical systematization of scientific procedure.'⁷⁸

In law his writings, small in quantity but of the highest quality, have not received adequate attention. This is because he expressed ideas far in advance of his generation, and by the time that opinion was ready for them they had been buried in the mass of his published work.

Holdsworth gives some account of his *Reading on the Statute of Uses*, his *Maxims of the Law*, and his *Legal Aphorisms*.

Of the *Reading on the Statute of Uses* (1600), which throws much light on the history of uses, Holdsworth writes that it 'gives him a place beside those few great teachers who have appeared at infrequent intervals in the history of English law—beside men like Blackstone and Maitland.'⁷⁹

Bacon did not believe the codification of the law to be advisable. But he was deeply impressed by the difficulty of ascertaining the law, and advocated a re-statement,⁸⁰ in the form of a digest of case law and a digest of statute law, supplemented by certain auxiliary manuals. One of these was to be a treatise *De regulis juris*, designed to explain 'those general dictates of reason which run through the different matters of law, and act as its ballast.' To show what he meant he wrote in 1596 a little book, *Maxims of the Law*, in which he commented on twenty-five maxims, illustrating them by cases and statutes.⁸¹

⁷⁸ Bertrand Russell, *History of Western Philosophy*.

⁷⁹ *H. E. L.*, V, 394—396. This was a double reading delivered in the Lent Vacation, 1600. We have only a part of it which was first published in 1642: republished with commentary in 1804 by Rowe.

⁸⁰ Holdsworth's very interesting account of Bacon's views on the re-statement of the law is given in *H. E. L.*, V, 486—489. It is unfortunately out of place, at the end of his account of Coke's writings.

⁸¹ *H. E. L.*, V, 398, 498—499. The book of *Maxims* is in Vol. VII of Spedding's ed. 309—387, with an account of the circumstances of its publication. Bacon states in the

Bacon's legal *Aphorisms*, ninety-seven in number, constitute the small legal section of his work, *De Dignitate et Augmentis Scientiarum*, commonly called *De Augmentis*. After his fall Bacon resumed a project which he had embarked upon, but abandoned, of having his *Advancement of Learning* translated into Latin for the benefit of continental readers. He secured a team of translators, revised his work, making omissions and additions, and republished it in 1623 under the title above stated. He described it as the first part of his *Instauratio Magna (Philosophiæ)*, or Reconstruction of Philosophy.⁸²

An aphorism is a concise statement of a principle applicable in a science. The object of Bacon's legal aphorisms was to prescribe certain tests to be applied to particular laws for the determination of the extent of the good or the bad in them.⁸³ Holdsworth writes that 'this small section of the *De Augmentis* shows that Bacon was one of the earliest common lawyers to appreciate the need for some sort of general jurisprudence, and that he was certainly the earliest to show by his precepts how it might be used to improve an existing body of law.'⁸⁴ Much of what he writes in this section is in vision so advanced that it might have been written by Bentham.

Among Bacon's other legal writings we have the text of 101 Orders which he issued in 1619 regulating the practice of the Court of Chancery, and of some supplementary orders of 1620.⁸⁵ His orders governed to a large extent the procedure of the court until the reforms of the nineteenth century.

23. Gerard Malynes⁸⁶ (d. 1641) was the first Englishman to write of the law merchant as a whole. He was a merchant of Lancashire origin, employed by the government c. 1586 as a commissioner of trade in the Low Countries, and later as an expert on coinage. His pioneer treatise, *Lex mercatoria* (1622), introduced English lawyers to the legal doctrines of the continent on mercantile matters: it is an important source of information about bills of exchange and the various courts administering the law merchant at home and abroad. The literature of the law merchant had consisted largely of the works of continental 'civilians,' who had adapted Roman law to modern commercial needs. But Malynes deprecated the unpractical character and excessive subtlety of many of their

preface that he had collected 300 maxims, but that 'I thought it good, before I brought them all into form, to publish some few.'

⁸² The second part was the *Novum Organum*, 1620, a guide to the interpretation of nature. Bacon sketched out a scheme of further parts of the *Instauratio Magna*, but the filling in of the sketches was very fragmentary. The *New Atlantis*, written in English and published after his death, was a description of a country in which his principles of scientific inquiry should be recognized.

⁸³ I give here a paraphrased translation of Aphorism 6.

⁸⁴ *H. E. L.*, V, 250. For a description of the principal subject-matter of the aphorisms, see pp. 248—250.

⁸⁵ Holdsworth, in *H. E. L.*, V, 253, states the principal topics dealt with in the orders. The text of the orders of 1619 is given in Bacon's *Works*, Spedding's ed. VII, 759—774, and in Sanders, *Chancery Orders* I, 109—122. The text of the 1620 orders is in Sanders, I, 129—131.

⁸⁶ *H. E. L.*, V, 131—135.

discussions of legal points, and regarded mercantile usage as the real foundation of commercial law.

24. *Richard Zouche*⁸⁷ (1589—1661) (scholar of Winchester College; scholar and fellow of New College, Oxford; advocate of Doctors' Commons) was the son of a Wiltshire landowner, and great-grandson of the 8th Lord Zouche. He became Regius Professor of the Civil Law at Oxford in 1620, and a judge of the court of Admiralty in 1641. He was the first Englishman to write about international law, following in the steps of the Italian refugee lawyer Alberico Gentili (R.P. Oxford, 1587, d. 1608) and the Dutchman Hugo Grotius (1583—1645). Zouche's *Juris inter Gentes Explicatio*, 1650, helped to make the nascent international law a part of English law, presented it for the first time in orderly form, and originated the division of the subject into 'Peace' and 'War.' He wrote also *Elementa Jurisprudentiae*, two books on feudal law, inspired by the article on *Feuds* in the *Glossary* (1626) of the historian Henry Spelman (1564—1641), and a great many other works of which a list is given in the *D. N. B.*

25. *John Selden*⁸⁸ (1584—1654) (Hart Hall, Oxford, and Inner Temple) came of a yeomanry family living in Sussex. He was a scholar, the quantity and quality of whose output is amazing. He wrote largely on oriental, ecclesiastical, and general historical subjects. Milton described him as 'the chief of learned men reputed in this land,' and Ben Jonson wrote, 'You that have been ever at home, yet have all countries seen, and, like a compass keeping one foot still upon your centre, do your circle fill of general knowledge.'

He never attempted to gain a large practice, but appeared chiefly in cases of constitutional importance. In spite of his being a Parliamentary Charles I at one time thought of making him Lord Chancellor.

In the legal field his best known works are *Mare Clausum* (a reply to Grotius' *Mare Liberum*); *Titles of Honour*; the *History of Tithes*; an edition of *Fleta*.

His pre-eminence led Maitland to give his name to the society founded in 1887 for the publication of original authorities in the history of English Law.

Selden is now best remembered by his *Table Talk*, notes of his conversation made by his secretary Richard Milward. His most quoted saying is:—'Equity is a roguish thing,—for law we have a measure, know what to trust to. Equity is according to the conscience of him that is Chancellor, and as it is larger or narrower so is equity. 'Tis all one as if they should make the standard for the measure we call a foot to be the Chancellor's foot; what an uncertain measure would this be; one Chancellor has a long foot, another a short foot, a third an indifferent foot; this the same thing in the Chancellor's conscience.'

⁸⁷ *H. E. L.*, V, 17—20, 58—60.

⁸⁸ *H. E. L.*, 407—412. Two articles by Professor Hazeltine in *Harvard Law Review*, xxiv, 165, 205.

A new edition of the *Table Talk*, by Sir Frederick Pollock, was published by the Selden Society in 1927.

26. *Henry Rolle*⁸⁹ (1589—1656) (Exeter College, Oxford, and Inner Temple) was great-grandson of a wealthy London merchant, who settled in Devonshire. Being a strong parliamentarian, he was appointed a judge of the K.B. in 1645, and C.J.K.B. in 1648. He resigned in 1655 because of his dislike for Cromwell's arbitrariness. He was one of the select band of Selden's friends who met constantly for scholarly talk. He made for his own use a collection of reports, in Law French, and an *Abridgment*. Both were published after his death, the latter by Hale.

Rolle's *Abridgment* is more orderly in arrangement than those of the sixteenth century, the classification of subjects being much more detailed. But it is more than a digest of case law. It contains summaries of Parliamentary records and of statutes. It therefore marks the process of transition between the sixteenth century use of the word 'Abridgment' in the sense of a collection of 'short points' of cases, and the eighteenth century use in the sense of an encyclopaedia.

27. *Sir Matthew Hale*⁹⁰ (1609—1676) (Magdalen Hall, Oxford, and Lincoln's Inn) was the son of a barrister belonging to a Gloucestershire family. In spite of his known royalist sympathies he was appointed a judge by Oliver Cromwell in 1654, but he refused reappointment on the latter's death. In 1660 he became C.B. and in 1671 C.J.K.B. His biographer, Gilbert Burnet, 1643—1715, wrote of him that as a barrister 'he might have had what practice he pleased,' and quoted the statement of an eminent lawyer, probably the Earl of Nottingham, to the effect that 'wherever he sat as a judge all business of consequence followed him, and no man was content to sit down by the judgment of any other court till the case were brought before him, to see whether he were of the same mind.' He was indeed conspicuous for integrity, humanity, industry and ability.

Hale rivalled Coke in knowledge of the common law, but unlike Coke he considered a wide range of other learning to be important to a lawyer. He made a thorough study of Roman Law and 'often said that the true grounds and reasons of law were so well delivered in the Digest that a man could never understand law as a science so well as by seeking it there, and therefore lamented much that it was so little studied in England.'

Hale was a very considerable legal author; in method a disciple of Selden. His *History of the Common Law*, a fragmentary sketch, was published long after his death, and went into six editions, the last three by Serjeant Runnington (1779—1820). Other well known works are his

⁸⁹ *H. E. L.*, V, 375—378.

⁹⁰ *H. E. L.*, VI, 574—595. The standard life is that by Gilbert Burnet (1643—1715), Bishop of Salisbury, author of *History of his own Times*. There is a short account in the 1st Earl of Birkenhead's *Fourteen English Judges*.

Jurisdiction of the Lords' House, and his unfinished *History of the Pleas of the Crown*. Little known, but of great value to scholars, are some of Hale's tracts which were published by Francis Hargrave. Hale also wrote notes on Fitzherbert's *Natura Brevium*, which were published in 1730, and notes on Coke's *First Institute*, which were incorporated by Hargrave and Butler in their edition.

His *Preface to Rolle's Abridgment* gives both a good account of some of the salient features of the law of his day, and a summary of the leading differences between that law and the mediaeval common law.

His *Analysis of the Civil Part of the Law* is a short preliminary sketch. Its arrangement, inspired by Justinian's *Institutes*, was adopted by Blackstone as being 'of all the schemes hitherto made public for digesting the laws of England the most natural and scientific of any, as well as the most comprehensive.'

28. *Sir Orlando Bridgman* (1606(?)—1674) (Queens' College, Cambridge; Fellow of Magdalene College; Inner Temple) was a son of a Bishop of Chester, and grandson of a Sheriff of Exeter. Sir Orlando was a very eminent royalist conveyancer, who after the restoration became C.B. for a few months in 1660, and as such presided over the trial of the regicides; then C.J.C.P., 1660—1667; and finally L.K., 1667—1672. He was dismissed at the instance of Lord Shaftesbury and the rest of the Cabal, because, when they advised applications for certain injunctions against bankers after the shutting of the Exchequer, he refused to grant them.

His clerk published in 1682 a volume of his *Precedents of Conveyances*, including those out of which the modern strict settlement evolved, and thus secured for Bridgman the reputation of being the father of modern conveyancing. Pepys wrote of him as a 'mighty able man,' and Lord Nottingham spoke of the veneration due to his learning and integrity.⁹¹

His *Reports* of cases in the C.P., 1660—1667, were not published until 1823. They must not be confused with those of Sir John Bridgman, C.J., of Chester, covering 1613—1621.

29. *William Sheppard* or *Shepherd*⁹² (d. 1675(?)) of Gloucestershire, had a large country practice. He was sufficiently well known to be called to London by Cromwell in 1653, and made a clerk of the Upper Bench. He then became a serjeant-at-law and was appointed to a judgeship of the County Palatine; he lost this office at the Restoration.

He was a voluminous legal writer: the *D.N.B.* gives a list of 24 publications. Among the more successful of these was one in which he gave a short account of common law procedure, and of the cases in which relief might be had in chancery. He called it '*The Faithful Councillor, or the Marrow of the Law in English.*' And his two books on *Actions on the Case* were sufficiently used to have second editions.⁹³

⁹¹ *H. E. L.*, VI, 537, 552, 605. Holdsworth quotes from *Davidson's Precedents* the statement that 'no one holds a more conspicuous station in the annals of conveyancing.'

⁹² *H. E. L.*, V, 391—392, 397.

⁹³ *H. E. L.*, VI, 606. One of the books was on the subject of actions on the case for slander, the others covered a wider field.

In 1641 a book appeared under his name which is of far superior calibre—*The Touchstone of Common Assurances*.⁹⁴ There is strong circumstantial evidence, supported by evidence of style, that Sheppard, who bought the library of Sir John Dodderidge, a judge of the K.B. 1612—1628, found in it the MS. of this treatise and published it as his own.

The *Touchstone* was forgotten until it was rescued from oblivion by the commendation of Sir John Willes C.J.C.P. 1737—1761. It afterwards went into several editions, the last being the eighth, in 1826. It was extensively used by real property lawyers in the eighteenth and nineteenth centuries.

30. *Sir Edmund Saunders* (d. 1683), C.J.K.B. 1683, wrote *Reports* notable both for their intrinsic merits, and as the text of the commentary known as *Williams' Saunders*. He was born in poverty in Gloucestershire, made his way in boyhood to London, and there picked up a living as a hanger-on of attorneys' clerks. From them he acquired skill in legal penmanship, so that he became, as Roger North says, an 'exquisite entering clerk.'

Somehow he saved enough money to pay for his call by the Middle Temple. At the bar his learning made him the only rival of his senior, the well-known Serjeant Maynard, in the art of drawing special pleadings. He was equally skilled in maintaining his pleadings in court.

Few men have so startlingly combined success with intemperance. Roger North⁹⁵ has left a vivid description of his bibulous habits and of the discomfort which they caused to his neighbours in court. The same writer does justice to Saunders' attractive side. He was a warm-hearted, likable man, with a sense of duty towards his clients which was then not to be taken for granted. The circumstances of his promotion were typical of his age. In 1682 Quo Warranto proceedings were instituted against the City of London, their aim being the forfeiture of its charters, and the consequent destruction of a Whig stronghold. Saunders had advised on the case and settled the pleadings. Charles II appointed him C.J.K.B. in January, 1683, so that he might preside over the hearing of the case, and secure a judgment favourable to the Crown. His tenure of office was of the briefest. For he broke down just as the case had reached its final stage, and could but send a message that his judgment was for the King.

Saunders' reports are concerned exclusively with the law of pleading, the exactness of which the transition from oral to written pleadings had intensified. He gives the pleadings in full in the Latin form which, after a temporary abeyance during the Commonwealth, had once more become obligatory. The account of the proceedings is in Law French of a much better quality than that of other seventeenth century law books.

⁹⁴ The word 'assurance' is an old-fashioned synonym of 'conveyance.'

⁹⁵ In *H. E. L.*, VI, 563—571, Holdsworth quotes freely from the *Lives of the Norths*, I, 293—296, and III, 90—93.

Holdsworth says of these reports⁹⁶ that 'they contained a selection of leading cases in which the modern rules were clearly, concisely and authoritatively laid down. In fact, these reports did for the modern rules of pleading what Coke's reports did for many branches of the common law—they provided a selection of authorities behind which it was rarely necessary to go.'

The first edition was in 1686: in the second, that of 1722, the French was translated into English. In 1799 Serjeant John Williams produced the third edition, with the pleadings in English. By using each case as a text for a discourse on the rules of pleading illustrated by it, Williams made his edition the indispensable manual of common law pleaders. He himself produced the fourth edition in 1809. His son, Edward Vaughan Williams,⁹⁷ who was a judge of the C.P. from 1846 to 1865, was responsible for the fifth edition in 1824,⁹⁸ the sixth in 1845 and the seventh in 1871. By that time the law of pleading had been so much changed that knowledge of the seventeenth century pleadings had ceased to be necessary. So they were omitted, and all that was retained as a text for the commentary was an abbreviated version of the original report.

31. *Sir Leoline Jenkins*⁹⁹ (1623—1685) (Jesus College, Oxford, and Doctors' Commons) came of a landed family in Wales. As a young graduate he took pupils at Oxford during the civil troubles: eventually, being a royalist, he went into voluntary exile. During the year following the Restoration he was appointed first to a Fellowship and then to the Principalship of Jesus College. Concurrently he was a judge both of the Court of Admiralty and of the Prerogative Court of the Archbishop of Canterbury. After his resignation of the headship of Jesus College in 1673 he was first engaged in important diplomatic missions, and then became Secretary of State. Roger North described him as "the most faithful drudge of a Secretary that ever the Court had."

In judicial decisions during the second Dutch war, 1664—1668, and later in written opinions, he laid down a number of fundamental principles governing the exercise of Prize jurisdiction.

He showed some interest in law reform, for he helped Lord Finch L.C. later Earl of Nottingham, and Sir Francis North C.J.C.P., later Lord Guilford, to draft the Statute of Frauds (1677), and he gave his support to the Statute of Distributions (1670). Other proposals of his own were for the time being abortive.

He did not publish any of his writings, but a collection of them was

⁹⁶ *H. E. L.*, VI, 571.

⁹⁷ Edward Vaughan Williams' son, Roland (1838—1916), became a High Court judge in 1890, and a Lord Justice of Appeal in 1897; the latter's son, Roland, became a K.C. in 1913.

⁹⁸ In the fifth edition, John Patteson, afterwards (1830—1852) a judge of the K.B., collaborated.

⁹⁹ Holdsworth gives accounts of him; shortly in *Some Makers of English Law*, 216—222, and fully in *H. E. L.*, XII, 646—661. Professor Llewellyn Davies has also written about him in two papers: *Transactions of the Grotius Society*, XXI, 149, and *British Year Book of International Law*, 1934, 21.

included in the two-volume *Life* by William Wynne (1724). They have been described as 'a rich collection of precedents on the maritime law of nations.'¹⁰⁰ Jenkins ranks as one of the three greatest exponents of that law in this country.¹⁰¹

32. *The Hon. Roger North*¹⁰² (1653—1734) (Jesus College, Cambridge, and Middle Temple), youngest son of the fourth Lord North, of Kirtling, Cambridgeshire, attained a large practice at the Chancery bar, but retired young and refrained from public life because of his Tory principles. His principal writings, not published until after his death, are his *Lives of the Norths*—biographies of his three brothers, Francis, First Lord Guilford, 1637—1685, L.K., 1682—1685, Dudley, 1641—91, an able financier, and John, 1645—1683, Master of Trinity College, Cambridge, 1677—1683; his *Autobiography*; and his *Discourse on the Study of the Laws*. Owing to his capacity for descriptive writing we have a more vivid picture of the day-to-day life of the law in the second half of the seventeenth century than we have in respect of any period before the nineteenth century. Like Hale he believed in the practical value of legal history and of Roman Law. A mere lawyer, he said, 'seldom reaches better preferment than to be a puisne judge, if at all to be ever invited from his chamber.'

THE EIGHTEENTH CENTURY

33. *Serjeant William Hawkins*¹⁰³ (1673—1746) (St. John's College, Cambridge, and Inner Temple) was descended from Sir John, the elder of the two sea captains of Elizabethan fame. He wrote what was for many generations the standard work on criminal law. Its title is *A Treatise of the Pleas of the Crown*. The first edition was published in 1716: the seventh, and last, in 1795. It is in two books: the first gives a survey of the substantive law; the second a survey of the courts exercising criminal jurisdiction, of methods of bringing suspected persons to trial, and of criminal procedure generally. Holdsworth described the treatise as "remarkable both for the learning of the author and his skill in the presentment of his material," and Professor Winfield has found its high reputation justified by its reliability. All practising criminal lawyers know it by name, but few nowadays have occasion to use it.

Hawkins also wrote an abridgment of Coke's *First Institute*. From his preface to it Blackstone quoted with approval the following sentence, 'Whoever considers how great a coherence there is between the several parts of the law, and how much the reason of one case opens and depends upon that of another, will I presume be far from thinking any of the old

¹⁰⁰ By Henry Wheaton (1785—1848), American lawyer, author of *Elements of International Law* (1836).

¹⁰¹ The other two are William Scott, Lord Stowell (1745—1836), and Dr. Stephen Lushington (1782—1873).

¹⁰² *H. E. L.*, VI, 494, 619. The best known edition of the *Lives of the Norths* is that of 1826; there is an edition of 1890, with the autobiography.

¹⁰³ *H. E. L.*, XII, 361—362, XI, 304—305; Winfield, 325—326.

learning useless, which will so much conduce to the perfect understanding of the modern.'¹⁰⁴

Hawkins also produced an edition of the statutes from Henry III to 7 George II in six folio volumes.

34. *Richard Francis*, barrister of the Middle Temple, has no entry in the *D.N.B.*¹⁰⁵ But his book, *Maxims of Equity*, which appeared in 1728, and went into four editions, deserves recognition. It was rescued from oblivion in 1926 by Professor (then Dean) Roscoe Pound, who gave an account of it in an article written for the volume of *Cambridge Legal Essays*, published in that year.¹⁰⁶

Francis' book is memorable as the first book published on the principles of Equity since St. Germain's *Doctor and Student* two hundred years before, and also as the first formulation of a number of maxims which for many generations played a large part in the study of Equity. Taking as his model Bacon's *Maxims*, Francis attempted to state in pithy form a number of principles which he derived from his study of the cases. Of the fourteen propositions, which he laid down as maxims, I quote seven, which have been included either in identical, or in a variant, form in the chapter entitled *Maxims of Equity* in *Snell's Equity*.¹⁰⁷

(1) 'He that will have equity done to him must do it to the same person.' This maxim is based on the report of *St. John v. Holford* (1668),¹⁰⁸ which states that Sir Harbottle Grimstone M.R. made a decree 'upon this rule, he that will have equity to help where the law can not, shall do equity to the same party against whom he seeks to be relieved in equity.' The decree was confirmed by Sir Orlando Bridgman L.K.

Story,¹⁰⁹ in *Equity Jurisprudence* (1836), adopted the formula, 'He who seeks equity must do equity.' This is the accepted version.

(2) 'He that hath committed iniquity shall not have equity.' Among the cases which Francis cites in support of the maxim is *Rich v. Sydenham*.¹¹⁰ The formula was probably framed by Francis. It appears in a footnote in the third edition of the report (1735), with a reference to *Maxims of Equity*.

The modern form of the maxim is, 'He who comes into equity must

¹⁰⁴ *Commentaries*, III, 268—269.

¹⁰⁵ The admission registers of the Middle Temple record that a Richard Francis was admitted 30th June, 1719, and was called 15th May, 1724. He is described as son and heir of John Francis, Sac. Theol. Doc., Dublin.

¹⁰⁶ *Principles of Equity* by Edmund Henry Turner Snell was first published in 1868. The editor of the 22nd edition, 1939, was H. Gibson Rivington.

¹⁰⁷ A *Festschrift* in honour of Henry Bond, William Warwick Buckland, and Courtney Stanhope Kenny. My sketch is almost entirely based on Professor Pound's article, 'On certain maxims of Equity.'

¹⁰⁸ 1 Cases in Chancery (1660—1688), 97.

¹⁰⁹ Joseph Story, 1779—1845, was Associate Justice of the U.S. Supreme Court, 1811—1845, and Professor of Law in the University of Harvard, 1829—1845.

¹¹⁰ 1 Cases in Chancery, 202.

come with clean hands,' adopting the metaphor first used by Eyre C.B. in 1787.¹¹¹

(3) 'Equality is equity.' This formula has not varied since it was framed by Francis. He based it on a statement made in 1675 by Lord Finch L.K., later L.C. and Earl of Nottingham, 'A debt without specialty is as much a debt *jure naturali* and in conscience as a debt by specialty, and therefore there shall be an equality with debts by specialty where conscience is the judge.'¹¹² The notion was not a new one: Bracton says, '*et dicitur aequitas quasi aequalitas*,' borrowing from Aristotle *via* the schoolmen.

(4) 'Equity regards length of time.' This maxim was superseded by the Latin tag, *vigilantibus non dormientibus aequitas subvenit*, which is a principle of general law, quoted in that form in Coke's Second Institute.¹¹³ In *Snell* the corresponding maxim is, 'Delay defeats equities,' with a quotation from Lord Camden L.C. 1766—1770, 'A Court of Equity has always refused its aid to state demands where a party has slept upon his rights and acquiesced for a great length of time.'¹¹⁴

(5) 'Equity regards not the circumstances but the substance of the act.' In *Snell* the text of the maxim is the one which, though not in *Story*, became current in America:—'Equity looks to the intent rather than to the form.'

(6) 'Where equity is equal, the law must prevail.' This maxim, which has retained the form given to it by Francis, has as its ancestor the proposition in Justinian's *Digest*, 'in *pari causa possessor potior haberi debet*.'¹¹⁵ Lord Cowper L.C. 1705—1710 and 1714—1718 put the principle thus, 'Tis generally true that law and equity together shall prevail against equity only; but then 'tis with this distinction that the equity that goes along with the law is of the same nature and is as strong as the other equity.'¹¹⁶

(7) 'Equity suffers not a right to be without a remedy.' This maxim appears in *Snell* in the form, 'Equity suffers not a wrong to be without a remedy.' It is an equitable version of *ubi jus ibi remedium*. Its pedigree, says Professor Pound, 'seems to be about this: Coke's remark that the law should not be deficient in justice to those who complain;¹¹⁷ Coke's quaint observation that 'want of right and want of remedy are in one equipage;¹¹⁸ and Holt's judgment in *Ashby v. White*.¹¹⁹ In a well-known passage he says: "It is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal."'

¹¹¹ *Dering v. Earl of Winchelsea*, 1 Cox, Equity, 318, at p. 319.

¹¹² *Hixon v. Wytham*, 1 Cases in Chancery, 248. Lord Nottingham's name when at the bar was Heneage Finch.

¹¹³ P. 690.

¹¹⁴ *Smith v. Clay*, 1767, 3 Brown's Chancery Reports, note on p. 638.

¹¹⁵ *Digest*, 50, 117, 128.

¹¹⁶ *Oxwith v. Plummer*, 1708, Gilbert, 13, 15.

¹¹⁷ Co. Lit., 197 b.

¹¹⁸ 6 Coke's Reports, 58 b.

¹¹⁹ 1703, 2 Lord Raymond, at p. 953. Sir John Holt was C.J.K.B., 1689—1710.

The remaining seven propositions stated by Francis, though they indicate compendiously the basis of equitable intervention in certain classes of cases, have not retained the status of maxims.¹²⁰

It may be convenient if I add the five maxims, not derived from Francis, which with the seven above mentioned make up Snell's twelve. They are: (1) Equity follows the law; (2) Where the equities are equal the first in time shall prevail; (3) Equity looks on that as done, which ought to have been done; (4) Equity imputes an intention to fulfil an obligation; and (5) Equity acts *in personam*.

Of these the first three were given currency as maxims by Story.¹²¹ The first is based on an argument in *Doctor and Student*.¹²² The second is a proposition familiar to lawyers of all countries, traceable ultimately to Justinian's *Digest*.¹²³ The third appears first in a statement of Lord Hardwicke L.C., 1737—1756.¹²⁴

The fourth of these supplementary maxims is a well-known rule which acquired the status of a maxim in *Snell*.

The fifth—Equity acts *in personam*—is traced by Professor Pound to Lord Cowper.¹²⁵ It was brought into prominence by George Spence in Vol. I (1846) of his *History of the Equitable Jurisdiction of the Court of Chancery*.¹²⁶

Professor Pound tells us¹²⁷ that maxims of equity have played a greater role in the practice and teaching of law in the United States than in England. It is significant that an edition of Francis' work appeared in America in 1823, and that there was a subsequent incorporation of it in Henning's *Maxims in Law and Equity*. There was a special need, when English equity was received in the formative period of American law, of having some general formulas to direct American chancellors and equity judges at a time when there was much hostility to equity, when American reports and precedents were few, and when a creative activity and a crystallising process had to go on at the same time. Some of the maxims were in Latin. Some were easily put into Latin. Thus they had the guinea stamp of antiquity. The rest had, or soon acquired, the proverbial form that made them seem the formulated wisdom of centuries.'

35. *Giles Jacob* (who describes himself as 'Gent' on his title-page) (1686—1744) was born in Hampshire, and was, he states, 'bred to the law under a very eminent attorney.' He was then for a time a steward and secretary.

¹²⁰ They are:—It is equity that he should make satisfaction which received the benefit; It is equity that he should have satisfaction which sustained the loss; Equity relieves against accidents; Equity prevents mischief; Equity prevents multiplicity of suits; Equity will not suffer a double satisfaction to be taken; Equity suffers not advantage to be taken of a penalty or forfeiture, when compensation can be made.

¹²¹ See Professor Pound's interesting account of these three maxims, pp. 266—273.

¹²² *Dialogue I*, Chs. 19, 20, 25; *Dialogue II*, Ch. 15.

¹²³ *Digest*, vi, 17, 63.

¹²⁴ *Guidot v. Guidot*, 1745, 3 Atkyns, at p. 256.

¹²⁵ *Toler v. Carteret*, 1705, 2 Vernon, 493; *aequitas agit in personam*.

¹²⁶ P. 426.

¹²⁷ P. 276.

He was an industrious compiler of legal manuals,¹²⁸ and also of a *Poetical Register, or Lives and Characters of the English Dramatic Poets*, 2 vols., 1719—20.

He was sufficiently well known to be introduced by Pope in two lines of the *Dunciad*:¹²⁹ 'Jacob, the Scourge of Grammar, mark with awe, Nor less revere him, Blunderbuss of Law.' His *chef d'oeuvre* was the *New Law Dictionary*, 1729. This ambitious and successful work is described by him as 'containing the Interpretation and Definition of words and terms used in the law; and also the whole law and the practice thereof, under all the heads and titles of the same: together with such informations relating thereto as explain the history and antiquity of the law.'

Mr. Cowley writes:¹³⁰ 'The older dictionaries of English law, the *Termes de la ley*, Spelman, Blount, and Cowell had in their later editions become over-crowded with words of antiquarian interest only. Jacob retained such of these as were of practical use but made the statement of the law the main feature of his work. Hence his compilation became an extremely useful legal encyclopaedia, more concise than any abridgment of the period.'

It went into 11 editions before 1800. The last of these, in 1797, was so much remodelled by the editor, T. E. (later Sir T. E.) Tomlins, that the latter felt justified in publishing later editions under his own name.

A reference to Jacob's *Dictionary* is a useful first step in any inquiry into eighteenth century law. And all the nineteenth century dictionaries are largely indebted to it.

36. *Henry Ballow* (1707—1782) (Lincoln's Inn), who held a post in the Exchequer, was regarded by Holdsworth as almost certainly the author of a book, published anonymously in 1737, entitled *A Treatise of Equity*.¹³¹ Hargrave recorded the fact that the book was ascribed to 'Mr. Bellewe'; the difference in spelling is unimportant. It is probably Henry Ballow to whom Dr. Johnson (1709—1784) referred when he said that he learned what law he knew chiefly from 'a Mr. Ballow, a very able man.' The same man was a friend of the poet Akenside, and was reputed a good Greek scholar. The only reason for doubting the attribution of the treatise is the *prima facie* improbability of its having been written by a man under the age of thirty. Why the author did not acknowledge a work which achieved a great reputation is inexplicable.

Holdsworth shows the treatise to be a very important one, valuable historically as a summary of the principles of equity on the eve of Lord Hardwicke's chancellorship (1737—1756). The author displays a strong bias towards discovering a philosophical foundation for equitable interference with the law. He repeatedly tries to base a doctrine of equity

¹²⁸ Neither of the lists in *H. E. L.*, XII, and the *D. N. B.* is complete. The number of publications is about twenty, mostly legal.

¹²⁹ iii, 149—150; quoted in *D. N. B.*

¹³⁰ P. xci.

¹³¹ *H. E. L.*, XII, 191—192, 222—237.

on a general principle of acknowledged truth. He is unlaywerlike in his failure for the most part, to cite authorities. In spite of the latter defect, the book acquired such prestige that when J. de G. Fonblanque (1760—1837), in later life a leader of the Chancery bar, set out as a young man to produce a survey of Equity, he took Ballow's treatise as his text, tracked down Ballow's cases, and showed in his commentary how far their authority had been confirmed or shaken in the intervening years. Fonblanque's learned expansion of Ballow, first published in 1793, reached a fifth edition in 1820, in spite of the inconvenience of its form, and held the field until the appearance of Story's *Equity Jurisprudence* in 1836.

37. *Sir Jeffrey Gilbert*¹³² (1674—1726) (Lincoln's Inn) is believed to have been born in Kent. He must have been a man of great ability, for he not only accomplished much as a lawyer during a short life, but was also a mathematical Fellow of the Royal Society. He became a judge in Ireland in 1715, was transferred to the English Exchequer in 1722, and was promoted Chief Baron in 1725.

Gilbert was a prolific author, but died before he had prepared his works for publication. His manuscripts were published posthumously, apparently without authority, many of them long after his death, and with inadequate revision. But in spite of this defect his pioneer monographs on particular legal topics, being clear, concise and comprehensive, met a great need in the 18th century, so that most of them were re-edited more than once. Other of his works were upon the history of the courts. He also compiled two volumes of reports.

The subjects of his legal manuals¹³³ were *Ejectments*; *Tenures*; *Evidence*; *Rents*; *Devises*; *Distresses and Replevins*; *Uses and Trusts*. There was a fourth edition of his *Distresses and Replevins* as late as 1823; and a third edition of his *Uses and Trusts* in 1811, by *Edward Burtenshaw Sugden*, who became Lord Chancellor in 1852, as Lord St. Leonards.

His works of a mainly historical character were *The Law of Executions, with the history and practice of the court of King's Bench*; *A treatise on the court of Exchequer*; *The History and practice of civil actions particularly in the court of Common Pleas*; and *The History and Practice of the High Court of Chancery*.¹³⁴

Among Gilbert's numerous manuscripts one which rendered service to most lawyers, receiving credit for it from few, was that on which Matthew Bacon based his *Abridgment*.¹³⁵

38. *Sir John Comyns*,¹³⁶ (1667—1740) (Queens' College, Cambridge and Lincoln's Inn) was the son of a barrister belonging to an Essex family.

¹³² *H. E. L.*, XII, 140—141. While C.B. of the Exchequer in Ireland he and the other members of his court were imprisoned because they had obeyed orders of the English H.L. conflicting with those of the Irish H.L. *Ib.*, p. 140.

¹³³ *H. E. L.*, XII, 355, 366—671, 186—188.

¹³⁴ *H. E. L.*, XII, 352, 182—183.

¹³⁵ *H. E. L.*, XII, 169—170.

¹³⁶ *H. E. L.*, XII, 168; Winfield, 245; Cowley, lxiv.

He was a Baron of the Exchequer, 1726—1736; a judge of the C.P. 1736—1738; C.B. 1738.

He wrote a work similar to those which in the eighteenth century were called *Abridgments*, namely, a series of monographs on different branches of the law, arranged in alphabetical order. It was one of the last works to be written in Law French, but was not published in that language. It appeared in an English translation, in five volumes, between 1762 and 1767, under the title *A Digest of the Laws of England*. It was often cited as of high authority, for Comyns was reputed the ablest lawyer among his contemporaries.

39. *Matthew Bacon*¹³⁷ (d. 1759) came from County Tipperary; he was called by the Middle Temple in 1732. He acquired a manuscript left by Gilbert C.B. which contained material for a legal encyclopaedia reaching as far as the title *Simony*. Bacon prepared this material for the press, and published the first volume in 1736, anonymously, calling it *A New Abridgment of the Law by 'A Gentleman of the Middle Temple.'* He died after he had published three volumes and prepared two-thirds of a fourth. This was completed by a Serjeant Sayer, the fifth and last volume was contributed partly by Sayer and partly by Owen Ruffhead.¹³⁸

Bacon's Abridgment had a very great success: it went into eight editions, the last (in eight volumes) being produced in 1832 by Sir H. Gwillim and C. Dodd. It was constantly cited throughout the nineteenth century and is still very useful.¹³⁹

But Bacon's abilities do not entitle him to a place among great legal authors. Gwillim wrote in his preface that Gilbert's manuscripts were full of inaccuracies due to 'the ignorance and neglect of the amanuenses whom the author's infirmities compelled him to employ,' and that 'unfortunately our compiler (Bacon) had not the most happy dispositions for the work he had undertaken,' and that 'if the manuscripts were in any part defective, if the subjects were but partially treated of in them, the titles which related to those subjects were left equally defective in the *Abridgment*. The compiler seemed to have as little inclination to supply the deficiencies of his author as he had sagacity to mark or correct his errors.'

Bacon also wrote *The Compleat Arbitrator*, and (anonymously) *Equity Cases Abridged*.

40. *Charles Viner* (1678—1756) came of a well-to-do family in Salisbury. He studied at Hart Hall, Oxford, but never took a degree; he was a member of both the Middle and the Inner Temples, but was never called. He devoted himself to promoting the study of English law, by the production of his great *Abridgment*, the first edition of which ran into twenty-

¹³⁷ *H. E. L.*, XII, 169, 393, 172.

¹³⁸ Cowley, lxiii. Ruffhead (1723—1769) produced a well-known edition of the Statutes.

¹³⁹ There were at least seven American editions in the nineteenth century, the last in 1876.

three volumes. It was not easy to get so large a work published: eventually he had it printed at his own expense on paper manufactured for the purpose, and issued the volumes from his house at Aldershot in unbound parts at 25s. a volume,¹⁴⁰ the first in 1741, the last in 1757.

Viner's confidence in himself was justified by results, for in 1758 only a few sets of his *Abridgment* remained unsold.¹⁴¹ A second edition was produced between 1791 and 1794, and a supplement in six volumes between 1799 and 1806. As to the quality of the work Holdsworth agreed with Hargrave, that its greatest defect was the faithfulness with which it followed the scheme of Rolle, which was obsolete, and in any case not suited to so large a scale. Hargrave wrote¹⁴² that he was the more frequent in his reference to the *Abridgment* 'because it tends to facilitate the use of that immense body of law and equity,' and that 'notwithstanding all its defects and inaccuracies it must be allowed to be a necessary part of every Lawyer's library.' Professor Winfield, who, we may be sure, has used Viner's *Abridgment* more than any other man living, writes that he has found it very useful.¹⁴³

Viner bequeathed his estate to the University of Oxford for the establishment of the Vinerian Professorship of English Law, and of the Vinerian Scholarships. He has thereby secured permanent honour for his name by its association with those of Blackstone and Holdsworth, the two greatest holders of his chair.

41. *The Rev. Richard Burn*¹⁴⁴ 1709—1785 (Queen's College, Oxford) was a vicar in Westmorland, the county in which he was born, and of which he was an historian. He had practical knowledge of the criminal law as a justice of the peace, and of ecclesiastical law as chancellor of his diocese.

He deserves to be remembered as the author of two legal classics, which had long careers of usefulness. His *Justices of the Peace*, published in two thin volumes in 1755, expanded throughout the years into the six stout ones of the thirtieth edition in 1869. His *Ecclesiastical Law*, 1763, an equally successful book, also became the standard work upon its subject. It reached a ninth edition in 1842. Holdsworth testifies to its clear exposition, and to the learning which it shows in all the component parts of the ecclesiastical law of England, namely, the civil law, the canon law, the common law, and statute law.

Another book by Burn, *The History of the Poor Law*, 1764, is very valuable historically for the criticisms in it, by one most competent to make them, of the current law.

¹⁴⁰—Holdsworth has told briefly the curious story of the printing and publishing of Viner's *Abridgment* in *H. E. L.*, XII, 164-168, and has written more fully in *L.Q.R.*, XXXIX, 20-23, 35-36. There is also an account of the subject by Strickland Gibson in Vol. II of the *Proceedings and Papers of the Oxford Bibliographical Society*.

¹⁴¹ In that year a member of Lincoln's Inn, possibly Robert Kelham, published a concordance of Abridgments, 'chiefly calculated to facilitate the references to the General Abridgment of Law and equity by Charles Viner, Esq.'

¹⁴² Note to Co. Lit. 9a.

¹⁴⁴ *H. E. L.*, XII, 332-334, 328-329, 612-613.

¹⁴³ P. 245.

42. *Sir Michael Foster*¹⁴⁵ (1689—1763) (Exeter College, Oxford, and Middle Temple) was the son of a Marlborough attorney. He acquired a large practice as counsel in the west country, and became recorder of Bristol. He was appointed a judge of the K.B. in 1745, on the recommendation of Lord Hardwicke.¹⁴⁶ He was therefore a member of that court when William Murray (1485)¹⁴⁷ was appointed to the Chief Justiceship as Lord Mansfield. The respect which both men enjoyed is reflected in the line, 'As Mansfield wise and as old Foster just.'¹⁴⁸ The latter's classic *Crown Law* was published in 1762, three years before the appearance of the first volume of Blackstone's *Commentaries*. The full title of the work is *A Report of some Proceedings on the Commission of Oyer and Terminer for the Trial of the Rebels in the County of Surrey and of other Crown Cases : to which are added Discourses upon a Few Branches of the Crown Law*. The second edition (1776), and the third (1792), were produced by Foster's nephew and biographer, Michael Dodson.

The subjects which Foster covered in his study of the criminal law, were limited to treason and homicide, but within that range his authority still stands unchallenged, and in difficult cases is invoked as a matter of course by counsel and judges. Sir James Fitzjames Stephen¹⁴⁹ said of this book that it would be difficult to overstate its merits within the limits chosen by the author, and that he wrote only as a perfect master of his profession could write. Foster wrote, too, at a time when the development of the criminal law could still be influenced by an appeal to first principles. 'I do not think it would be possible,' said Stephen, 'to cite a better illustration of the good side of what has been called judicial legislation.'

¹⁴⁵ *H. E. L.*, XII, 135—137.

¹⁴⁶ Philip Yorke (1690—1764), C.J.K.B. 1733—1737; L.C. 1737—1756; *cr.* Baron Hardwicke 1733; *cr.* Earl 1754.

¹⁴⁷ The Hon. William Murray (1705—93), yr. son of Viscount Stormont; C.J.K.B. 1756—1788; *cr.* Baron Mansfield 1756; *cr.* Earl 1776.

¹⁴⁸ Charles Churchill (1731—1764), *Rosciad*, 9th ed., p. 13.

¹⁴⁹ *History of the Criminal Law* (1833) Vol. II, 213. The passage is quoted in full in *H. E. L.*, XII, 137.

ALLEGIANCE, DIPLOMATIC PROTECTION AND CRIMINAL JURISDICTION OVER ALIENS

H. LAUTERPACHT

THE *cause célèbre* of *King v. William Joyce*, subsequently reported as *Joyce v. Director of Public Prosecutions*,¹ was concerned to a large extent with matters of interest for international law, and it is mainly from this point of view that it is proposed to discuss it in the present article.² Obviously the case is also of considerable importance both for criminal law, in so far as it is concerned with the crime of treason, and for constitutional law inasmuch as it bears directly on the question of the nature and the obligations of allegiance. However, it is probable that the case books which will claim it most insistently will be those of international law. For the decision in *Rex v. Joyce* is not only an authority on certain aspects of allegiance owed by aliens and of the right of a State to assume jurisdiction over acts committed by aliens abroad. It sheds light on such questions as the nature of diplomatic protection of citizens, the right of a State to protect diplomatically persons who are not its citizens, the obligation of allegiance of so-called protected persons, and some others. Not all these questions were judicially answered, but they loomed large in argument and imparted to the proceedings the complexion of a case concerned predominantly with international law. In view of this it may be pertinent to preface this article by drawing attention to a point which appears to be a mere matter of terminology but which, it is believed, raises an issue of wider significance.

I.—‘COMITY OF NATIONS’

Throughout the proceedings in the *Joyce Case* the principal argument put forward on behalf of the accused was that it would be contrary to the ‘comity of nations’ for an English court to assume jurisdiction over an alien for a crime committed abroad. The House of Lords held that ‘no principle of comity demands that a state should ignore the crime of treason committed against it outside its territory.’³ The reference to ‘comity of nations’ when what the Court really has in mind is ‘the law of nations’ or ‘international law’ has been a somewhat persistent feature of recent English (and, at times, American) judicial practice. It seems to have gained currency following upon the judgment in *The Parlement Belge*, the well-known case concerned with the jurisdictional immunity of

¹ [1945] W. N. 220; 173 L. T. 377 (Court of Appeal); [1946] A. C. 347 (House of Lords).

² The article is the substance of a lecture delivered in the Law School of the University of Cambridge in the Lent Term, 1946. I have expanded the lecture by the addition of footnotes and otherwise, but I have retained some passages as delivered on that occasion.

³ [1946] A. C. at p. 372.

foreign State-owned ships. In that case Brett L. J. formulated the principle of jurisdictional immunity as being 'the consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state.'⁴ Prior to that decision the courts, in relevant cases, referred as a rule without ambiguity to the 'law of nations' or to 'international law.'⁵

This is not the proper occasion for enquiring in detail into the reasons of the fascination which the term 'comity of nations' has exercised over judges and practising lawyers. It is possible that the lingering influence of Austinian positivism which rejects the claim of the law of nations to be law 'properly so-called' may have given added attraction to a vague, non-committal and somewhat pretentious form of words which is on occasions strangely out of keeping with the reality of international relations. However that may be, it is suggested that the term 'comity of nations' is misleading and that there is no such antiquity about it as to make its abandonment impracticable. Essentially,⁶ the term 'comity of nations' refers to considerations of courtesy, amity, neighbourly feeling and reciprocity. Such considerations are not, on the face of it, germane to any distinct element of legal obligation.⁷ Yet the rules which English courts administer in deference to 'comity of nations' in such matters as diplomatic privileges or immunities of foreign States and of their property are rules which are binding by reason of international law proper, not by virtue of vague considerations of 'comity.' An English court could not properly refuse to apply such rules with respect to a State with which Great Britain entertains normal diplomatic intercourse but with which it has no relations amounting in any true sense to 'comity.'

The expression 'comity of nations' is often used in the sphere of 'conflict of laws,' especially in connection with the enforcement of foreign judgments. Even in the limited province of 'conflict of laws' writers are practically unanimous that the notion of 'comity of nations' is at best unhelpful and at worst wholly inaccurate.⁸ In the sphere of

⁴ (1880) 5 L. R. P. D. 197, at p. 214.

⁵ See, e.g., *Viveash v. Becker* (1814), 3 M. & S. 284; *De Wutz v. Hendricks* (1824) S. C., 9 Moore, 586, where Best C.J. held 'that it was contrary to the law of nations (which in all cases of international law is adopted into the municipal code of every civilized country)' to raise money in England in support of a rebellion in a foreign country; *The Emperor of Austria v. Day and Kossuth* (1861) 2 Giff. 628; and many others.

⁶ For the various meanings of 'comity of nations' see Oppenheim, *International Law*, vol. I (6th ed. by Lauterpacht). § 19c.

⁷ Unless, of course, what is meant, by way of a somewhat confusing circumlocution, is that the rule applied is one of law though originating in 'comity.' See, for instance, *Russian Socialist Federated Soviet Republic v. Cibrario* (an American case): *Annual Digest*, 1923—1924, Case No. 17; 235 N.Y. 255; 139 N. E. 259, where the Court said: 'Comity may be defined as the reciprocal courtesy which one member of the family of nations owes to the others. It presupposes friendship . . . Rules of comity are a portion of the law that they [courts] enforce.'

⁸ See Cheshire, *Private International Law* (2nd ed. 1938), pp. 6, 581; Wolff, *Private International Law* (1945) pp. 14, 15.

public international law it suffers from the same—and additional—drawbacks. For in the practice of States there exist rules which are followed habitually but not '*opinio necessitatis juris*,' i.e., as a matter of legal obligation. Thus, for instance, Great Britain, the United States, and other States grant to foreign diplomats certain facilities and exemptions in connection with customs duties and customs examination. These facilities are conceded not because of any duty owed by virtue of international law but as a matter of courtesy. Similarly, while as a matter of international law, as interpreted by her courts, Great Britain has full jurisdiction over foreign merchant vessels in British ports and territorial waters, as a matter of 'comity' that jurisdiction is in fact exercised only in certain categories of cases.⁹ There is thus in these matters a clear and practical distinction between 'comity' and law, and, if the current laxity of terminology is persisted in, judges might find it necessary in the same case to use the same word to express two essentially different ideas. Moreover, if the habit continues of referring to 'comity' when 'law' is meant, there is a danger, which some decided cases have brought home, of law being in fact treated as if it were mere 'comity.' Thus in *The El Neptuno*,¹⁰ a case involving jurisdictional immunities of a vessel claimed by two recognized governments, Mr. Justice Langton remarked that 'the whole of this doctrine of immunity from arrest is a matter that rests upon the comity of nations' and exhorted both parties not to strain the obligation of courtesy, 'resting as that obligation does upon that slender point.'¹¹ It is an interesting gloss upon the existing confusion of terminology that that 'slender point' of comity of nations was described, in a case decided in 1946, as a 'paramount rule of law.'¹² In view of this it is suggested that it would be conducive to both clarity and accuracy if in cases involving the application of the law of nations lawyers would revert to the practice which was followed for a century since Lord Mansfield and Blackstone and which dispensed with the solemn and benevolent reference to 'comity of nations.' The doctrine that international law is part of the law of the land is one of the major and beneficent contributions of the common law to modern jurisprudence, and this fact provides an additional reason for referring to international law when international law is at issue.

II.—CORRELATION OF PROTECTION AND ALLEGIANCE

It is convenient, at this stage, to give a brief account of the facts in the case of *Joyce v. Director of Public Prosecutions*. William Joyce was born

⁹ See also Phillimore, *Commentaries upon International Law* (3rd ed., 1879), vol. I, p. 522, where he points out that extradition of criminals is a matter of comity, not of right.

¹⁰ *Lloyd's List Law Reports*, 62 (1938), p. 7.

¹¹ At p. 9.

¹² *The Tolten* [1946] P. 135, at p. 151 (*per* Scott L.J.). And see *Foster v. Driscoll* [1929] 1 K. B. 470, where Lawrence L.J. based the decision on 'obligations' of 'international comity' the disregard of which 'would furnish a just cause for complaint by the United States Government.'

in 1906 in the United States of America. His father was a British subject by birth, but later, before William Joyce was born, he acquired American citizenship by naturalization. William Joyce thus became a natural-born citizen of the United States, born of an American father. In 1909 he was brought to Ireland, where he stayed till 1921. In that year he came to England and settled there. On various occasions he described himself as a British subject. In 1933 he applied for a British passport. In the application he described himself as a British subject by birth, born in Galway, Ireland. He was granted the passport, for the purpose of holiday, valid for various European countries. In September, 1938, and in August, 1939, he applied for, and was granted, a renewal of the passport. On 24 August, 1939, he left England, leaving in the country his parents, his brothers and his sister. On 18 September, 1939—at a time when Great Britain and Germany were at war—he accepted a post as an announcer of English news in the German radio company of Berlin and continued in that capacity till 1945 when he was arrested in Germany by British authorities. His passport was not found on him. It appeared that in 1940 he acquired German nationality. When brought to England he was indicted for high treason under the Treason Act, 1351. In the Central Criminal Court Tucker J. directed the jury that ‘on 24 August, 1939, when the passport was applied for, the prisoner beyond a shadow of doubt owed allegiance to the Crown of this country and that, on the evidence given, if they accept it, nothing happened at the material time thereafter to put an end to the allegiance that he then owed.’ The jury found Joyce guilty, and he was sentenced to death. He appealed. The Court of Appeal unanimously dismissed the appeal. After the Attorney-General certified that the decision of the Court of Appeal involved a point of law of exceptional public importance and that it was desirable in the public interest that a further appeal should be brought, Joyce appealed to the House of Lords. The House of Lords, by a majority of four to one, dismissed the appeal. On the matter of substantive law the Law Lords were unanimous that, in the words of Lord Porter’s dissenting judgment, ‘if an alien is under British protection he occupies the same position when abroad as he would occupy if he were a British subject’ and that ‘each of them owes allegiance, and in so doing each is subject to the jurisdiction of the British Crown.’¹³ The reasons, which are more of a procedural nature, of Lord Porter’s dissent are discussed below.¹⁴

The rule of English law in the matter of the obligations of allegiance owed by the alien residing within the realm is clear and fully in conformity with the existing international practice in the matter. An alien owes allegiance to and is subject to the law of the country, including the law of treason, in respect of acts committed within the territory in which he resides. This subjection to the law of the State—and, in particular, to the law relating to treason—is, in principle, an obligation limited to the

¹³ At pp. 375, 376.

¹⁴ See p. 338, n. 25.

alien while present in the country and while receiving the protection of its laws; it ceases with the termination of the corporeal presence of the alien within the territory and the cessation of the protection of the laws of the State of his residence. This is a somewhat elaborate statement of the law but it is a statement more accurate than the simple proposition that an alien owes allegiance to the Crown only while he is in this country. As far back as 1707 it was laid down in a rule adopted 'by all the Judges assembled at the Queen's command' that if such an 'Alien seeking the Protection of the Crown having a Family and Effects here, should during a War with his Native Country, go thither and there Adhere to the King's Enemies for purposes of Hostility, He might be dealt with as a Traitor. For He came and settled here under the Protection of the Crown. And though his Person was removed for a time, his Effects and Family continued still under the same Protection.'¹⁵ The case is somewhat apocryphal, but the House of Lords, which did not doubt its authenticity—as well as the Courts below—relied on it in the *Joyce Case* as an illustration of the underlying major principle rather than as a direct authority fully covering the details of the case before them. What are these principles?

The first is of a general character. There may be cogent reasons in the case of the law of treason, which has often been used as an instrument of despotism and oppression, for viewing with suspicion anything in the nature of judicial legislation. On the other hand, this is a branch of law in which the security and the highest interests of the State require that the purpose of the law should not be defeated by an inability to adapt, in a spirit of justice and common sense, established principles to new circumstances and conditions. Thus by a consistent judicial interpretation of the statute of 1351, which was by its terms limited to acts committed in England, it had been established that treason, under the statute, may be committed by a British subject both within the realm and abroad. There was no disposition, in *R. v. Casement*,¹⁶ to challenge the soundness of that interpretation of the statute. In *De Jager v. Attorney-General of Natal*, it was held, by way of a seemingly striking innovation, that the alien's duty of allegiance, as established by the relation of protection, was not affected by the circumstance that owing to enemy occupation the authority of the Crown had been temporarily displaced.¹⁷

The second principle illustrated by the Resolution of the Judges in 1707 and more directly related to the case at issue is the correlation between allegiance and protection. This principle was formulated in *Calvin's Case* in the maxim: '*Protectio trahit subjectionem, et subjectio protectionem*. It expresses a feudal doctrine of much antiquity and much moral force. The protection given by the lord had as a necessary corollary the obligation of fidelity. That reciprocity of benefit and duty, of allegiance and

¹⁵ Foster's *Crown Cases* (1762 ed.), p. 185.

¹⁶ [1917] 1 K. B. 98.

¹⁷ [1907] A. C. 326. A striking illustration of the same principle will be found in the American case *Carlisle v. United States* (1872) 16 Wall. 147.

protection, is not, of course, an artificial and obsolete formula of a past period. It is expressive of a compelling principle of political ethics and, above all, of the security of the State. The alien resident in a foreign country continues to owe allegiance to the sovereign of his own State. That allegiance expresses itself in his continued subjection to the laws of his own country—though, more often than not, the home State considers it convenient to limit its claims to jurisdiction with regard to the acts of its nationals when abroad. But, while continuing to be bound by allegiance to his own State, the alien becomes subject to another allegiance—that concomitant with the protection of the law which shelters him. There is nothing technical or mercenary about that reciprocity of allegiance and protection. That reciprocity is a formal relation only in the sense that it is of no legal relevance whether there is at any given moment an equivalence of duty and benefit, of allegiance and protection, of an actual disposition to fidelity and actual capacity to afford protection. The *De Jager Case*¹⁸ showed that the duty of allegiance is not affected by the temporary and involuntary absence of protection. In *Johnstone v. Pedlar*¹⁹ the Court brushed aside the suggestion that as the plaintiff, an American citizen of Irish revolutionary sympathies, was not entitled to the full protection of the law because of his active sympathies with the cause of the Irish revolution.

It was the overriding principle of the correlation of allegiance and protection on which the Crown based its case in *R. v. Joyce* and which is the *ratio decidendi* of the Judgments of the Court of Appeal and the House of Lords. In leaving the country armed with a British passport obtained at his request and as the result of his own representations—‘wrapped in the Union Jack,’ to use the picturesque phrase of the Attorney-General—Joyce caused the continuation, in a different sphere, of the protection hitherto extended to him by the law. In the view of the Prosecution, fully adopted by all three Courts, that protection was, *in posse*, of a substantial character. The diplomatic protection of citizens abroad is one of the most important functions of the foreign services of the modern State. This applies in particular to a country such as Great Britain, with far-flung interests and with considerable foreign investments. Lord Palmerston’s great speech in the case of *Don Pacifico*—one of the frequently cited examples of pacific blockade and reprisals undertaken as a measure of protection of a British subject abroad—reveals impressively this aspect of the foreign relations of the modern State.²⁰ The South African War, the (somewhat nominal) war with Venezuela in 1903, and a number of others had their origin in the necessity to protect the interests of British subjects in foreign countries. The great majority of cases which have come before international tribunals—including those before the Permanent Court of International Justice—have been cases arising out

¹⁸ *Ubi supra*.

¹⁹ [1921] 2 A. C. 262.

²⁰ For a general appreciation of its importance see Dunn, *The Protection of Nationals* (1932) pp. 27—71. See also Jessup in *Columbia Law Review*, 46 (1946), pp. 903—909.

of an alleged injury suffered by a national abroad. In a recent case the Supreme Court of the United States gave vivid expression to this aspect of the foreign relations of the State.²¹

The significance and value of diplomatic intercession lie not only in the actual instances—numerous as they are—of representations, complaints, formal claims and other methods of intercession. They lie in the availability of that protection, in the power which lies behind it, and in the resulting respect and security enjoyed by the subject as a normal accompaniment of his stay abroad. That protection extends—and is to a large extent effective—to citizens in the territory of a country with which a State is at war. They are protected, against treatment in violation of international law, by the threat of reprisals against enemy nationals, and, in favourable circumstances, of compensation exacted after the war. For these reasons there was probably little persuasive force in the suggestion, put forward on behalf of the accused in the *Joyce Case*, that the kind of protection which, in the past, was the basis and the cause of the duty of allegiance was protection by the law—i.e., by the ordinary processes enforceable by the courts of law—as distinguished from what was described as administrative protection, namely, in the present case, protection by the officers of the State abroad. The House of Lords rejected that distinction largely on the ground that, historically, the protection enjoyed by the alien within the realm was also an ‘administrative’ protection exercised as part of the royal prerogative. An equally persuasive answer could have been founded on the fact that in so far as allegiance is a corollary of the duties of protection assumed by the State, such duties are more onerous and more exacting in the external sphere than within the State where the protection of the alien is part of the ordinary machinery of the administration of the law.

III.—DIPLOMATIC PROTECTION OF NON-NATIONALS

The correlation of allegiance and protection is of such basic and compelling character that no determined attempt was made in *R. v. Joyce* to challenge it as a major principle of law. However, it was sought to limit its operation both by reference to the case at issue and to the nature of protection in general. This aspect of the case raises issues of international law of considerable interest. It was contended on behalf of the accused that in the case before the Court there was no basis in law for the establishment of the relation of protection (with the corresponding duty of allegiance) on the ground that a State is not entitled to issue a passport to a non-national; that it is, in any case, not entitled to extend

²¹ *Hines v. Davidowitz* (1941) 312 U. S. 52. The Court said: ‘One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another’s subjects inflicted, or permitted, by a government.’

diplomatic protection to a person who is not one of its nationals; and that, in view of this, as well as of the fraudulent nature of the representation by which the passport had been obtained, that document was not calculated to afford effective protection abroad.

For the purposes of the case before the Court the question whether a State can issue a passport to a person who is not its national was, largely, irrelevant. For the passport had been issued to an individual representing himself and believed by the authorities to be a British subject. In general, the question whether a State is entitled to issue a passport to a non-national is one of the municipal law of that State.²² A passport is primarily a means of identification, and foreign States are concerned with it only to the extent that, in relation to them, a person holding a passport and described there as a national (or, probably, as a protected person) of a State is entitled to treatment as such and to the recognition of his right to be diplomatically protected by his own State. Undoubtedly, the foreign State in question is entitled to challenge his right to such treatment and to diplomatic protection on the ground that, contrary to the allegation of the passport, he is not in fact a national of the State concerned. The frequent controversies in which the United States has been concerned on this subject provide some illustration of the difficulties involved. The uniform practice of the United States has been that although a foreign government may traverse, on the ground of fraud or illegality, the American nationality of the holder of an American passport, the Government of the United States has alone the right to determine whether the person concerned is in fact an American citizen.²³ The controversies have arisen largely in connection with cases in which a foreign government has challenged the legality, according to the law of the United States, of a naturalization of one of its nationals in the United States. It is unlikely that other countries would show a similar sensitiveness in the matter or that they could do so consistently either with the practice of international tribunals or with the rules relating to nationality of claims. International tribunals have uniformly asserted jurisdiction to determine whether a person does in fact, according to the law of the country granting the passport,

²² So far as international law is concerned there is probably nothing to prevent a State from issuing a passport (or similar instrument of identity) to a person who is described there as not being its national—except that in such cases the passport will not provide a basis for diplomatic protection. The case of passport issued to so-called protected persons is discussed below, p. 339. The United States claimed for a time the right to issue passports and to afford diplomatic protection to aliens who declared their intention to become citizens of the United States. The latter claim was repeatedly challenged by other States, and the relevant statute, enacted in 1907, was repealed in 1920 (see Hackworth *Digest of International Law*, vol. III (1942), § 266). On one occasion the United States invoked for a person in this category treaty benefits conferred upon citizens of the United States: see *United States (Edward A. Hilson) v. Germany*, decided in 1925 by the American-German Mixed Claims Commission (*Annual Digest of Public International Law Cases*, 1925—1926, Case No. 198, p. 205). This was a case of a seaman, a British subject, who had filed a declaration of intention to become an American citizen. The Commission rejected his claim.

²³ See, for a detailed account, Borchard, *Diplomatic Protection of Citizens Abroad* (1915) pp. 517—519.

possess the nationality of that country.²⁴ As a matter of wider principle, the subject is governed by the somewhat technical but essentially reasonable rule, usually referred to as the rule of nationality of claims, according to which an international tribunal has jurisdiction to entertain a claim put forward by a State on behalf of a private person only if that person was a national of that State continuously from the time of the occurrence of the injury till the actual commencement of the proceedings (or, probably, even till the rendering of the award). This means necessarily that the question whether the person concerned is its national or not cannot be left to the exclusive determination of the State claiming the right of protection. On the other hand, until an international tribunal has found that the person in question is not a national of the State issuing the passport and asserting the right of protection, that State is entitled to insist that the passport constitutes *prima facie* evidence of nationality,

With reference to the matter directly before the Court in the *Joyce Case*, the position was, therefore, as follows:

- (a) by virtue of the relationship evidenced by the issue of the passport Joyce enjoyed the protection of the Crown for the duration of the validity of the passport so long as it was not revoked by the competent British authority;²⁵

²⁴ For references to these cases see Borchard, *op. cit.*, p. 522.

²⁵ The passport, though fraudulently obtained, was a valid document, until its validity expired or until it was revoked by the authorities. The position in this respect was the same as in the case of a certificate of naturalization obtained by fraudulent representations. So long as the certificate has not been revoked by the Secretary of State it is conclusive as to the status of the person naturalized. The effects of a fraudulent naturalization may go even beyond that. There is an interesting Opinion of the Law Officers of the Crown of 6 July, 1906, to the effect that a person who had obtained American naturalization by fraud and whose naturalization was subsequently cancelled could not nevertheless recover his British nationality which he had lost as a result of the original naturalization.

It may be convenient to refer in this connection to Lord Porter's dissenting judgment in the *Joyce Case*. The learned Law Lord held that there was no evidence before the jury on the strength of which they could—or, indeed, were invited to—hold that the accused in fact retained the passport for the duration of its validity. He was of the opinion that that question was one for the jury to decide. For if the passport had been discarded, there would have been an end to the relation of protection and, with it, of the obligations of allegiance (at pp. 374—381). It is submitted that if the accused had actually destroyed the passport, that circumstance would not have materially affected the legal position. The passport, conceived as a document with words written and printed on it, is but a piece of evidence. It may be replaced by a duplicate. What matters is the relationship established by the document. That relationship would not cease as the result of the physical loss or destruction of the paper which evidences it. If Joyce, after having deliberately destroyed the passport, after having served Germany for a period, and after having gained experience of the methods and of the true purposes of her rulers, decided, at grave peril to his life and liberty, to sever his connection with what he had come to consider the régime of evil, he would have been in the same position as if he had never discarded the passport. If imprisoned in Germany, he would have been entitled to British diplomatic protection. If he had succeeded in escaping and in reaching neutral territory, he would have come there under the protection of British diplomatic and consular representatives. It is probable that nothing short of a formal and public act of renunciation of protection—a renunciation effected by a revelation of his true nationality—would have been sufficient to put an end to the mutuality of protection and allegiance. Of this there was no indication. On the contrary, it was not denied that until the collapse of Germany Joyce kept up the pretence of being a British subject. In an interesting Opinion given on 13 November, 1861, the Law Officers advised Earl Russell that although certain British subjects lost the right to British protection as the result of enlisting in the army of the Pope, on leaving the service as the result of discharge or desertion they could

(b) although during that time it was open to a foreign State to challenge the attestation of British nationality as shown in the passport, Joyce would, until an adverse decision of an international tribunal, enjoy British diplomatic protection. Actually, unless he had himself raised the issue, no foreign State would have had reason for questioning his nationality.

At the same time, the issue before the Court in the *Joyce Case* drew attention to the necessity for a somewhat revised formulation of the rule of nationality of claims and of diplomatic protection generally. The test of nationality is probably too narrow for the purpose even if we discard the now practically obsolete relic of *protégés*—i.e., persons employed in the legations and consulates of the protecting State—in certain Oriental countries. A number of States, including Great Britain, grant diplomatic protection abroad to natives of territories over which they exercise the functions of protection in various forms. Thus there are at least four classes of persons—often referred to as British protected persons—who, though not British subjects, receive British passports and enjoy British consular and diplomatic protection. These persons are the inhabitants of British protectorates, of British protected States, of Indian native States, and of various other territories such as Bahrein and the Anglo-Egyptian Sudan, and, finally, the inhabitants of the mandated territories and, in due course, of the territories under the system of trusteeship.²⁶ Thus Great Britain, as the Mandatory, affords diplomatic and consular protection to Palestinian citizens outside Palestine who for this purpose are in the same position as other British protected persons. At the same time Palestinian citizens are aliens in the contemplation of the British Nationality and Status of Aliens Act.²⁷

International law recognizes the right of a State to grant diplomatic protection to persons in these and similar categories. International tribunals have held that some of these protected persons are British nationals (*ressortissants*)—though not British subjects—within the meaning of the Peace Treaties of 1919 and that for that reason they were entitled to the benefits of these Treaties.²⁸ In a different sphere, in the

claim British protection outside the Papal territory: F. O. 83/2296. See also the Opinion of 25 February, 1862, admitting the right of protection enjoyed by a person who renounced his allegiance to the Crown 'though prospectively, and not in an irrevocable manner.'—apparently as the result of a declaration of intention to become naturalized in the United States: F. O. 83/2213. And see the Opinion of 11 March, 1865, for the acknowledgment of the principle that 'the sons of British born subjects are bound by the obligations of allegiance, and, therefore, entitled to the protection of Her Majesty': F. O. 83/2296.

Quære, does the principle of *R. v. Lynch* [1903] 1 K. B. 444, apply to the termination of the allegiance, during war, of a protected person who is not a British subject?

²⁶ For a discussion of the subject see Mervyn Jones in *British Year Book of International Law*, 22 (1945), pp. 122—129.

²⁷ *R. v. Ketter* [1940] 1 K. B. 787. For a case on the status of an Egyptian who was a British protected person by virtue of the British protectorate over Egypt see *R. v. Campbell* [1921] 2 K. B. 473. Interesting information on the diplomatic protection of British protected persons will be found in the Opinions of the Law Officers of June 8, 1893, and of February 17, 1905.

²⁸ *National Bank of Egypt v. German Government* (decision of the Anglo-German Mixed Arbitral Tribunal of May 31, 1924; *Annual Digest of Public International Law Cases*

Muscat Dhows case between France and Great Britain, decided in 1905 by the Permanent Court of Arbitration, it was held that a State is entitled to grant the protection of its flag to the ships of any other nation.²⁹

To what extent does the existing rule as to nationality of claims require modification in view of the fact that international law permits diplomatic protection of persons other than the State's own nationals? The correct answer is probably that international tribunals have jurisdiction to entertain claims by the protecting State on behalf of such persons provided that they are not nationals of any other State. This is so especially when the particular relationship of the protecting State to the territory in question has been internationally recognized. The same principle applies to diplomatic protection.³⁰

IV.—THE DUTY OF ALLEGIANCE OF PROTECTED PERSONS

The principle, seemingly adopted in the *Joyce Case*, that an alien receiving diplomatic protection abroad is, because of that fact, bound by the obligations of allegiance leads on the face of it to consequences so far-reaching as to make us pause before accepting it in its entirety. Does any such principle mean that the inhabitants of British protectorates, of British Protected States, of the native States of India, and of British mandated (and trust) territories owe allegiance to the Crown either generally or when they are abroad? These territories are foreign territory in the contemplation of English law. Thus in *Sobhuza II. v. Miller*³¹ it was held, in effect, that the Protectorate of Swaziland was foreign territory and its inhabitants aliens, and that the Crown was entitled to plead in relation to them the defence of 'Act of State'—a defence available only with regard to acts done outside the dominions of the Crown in relation to persons who are not British subjects. It is, of course, arguable that, apart from the question of diplomatic protection abroad, such persons owe, indirectly, allegiance to the Crown. They owe direct allegiance to their ruler, who, in turn, owes some kind of allegiance to the suzerain or the Protecting State. The oath of allegiance of a national of Palestine is not to the King, but to the Government of Palestine. Yet the Government of Palestine is one appointed under the authority of the King and probably owes allegiance to him. The South

1923—1924, Case No. 9), and *National Bank of Egypt v. Austro-Hungarian Bank* (decision of the Anglo-Austrian Mixed Arbitral Tribunal of July 13, 1923; *ibid.*, Case No. 10).

²⁹ In this particular case the Tribunal held that the right of France to grant to the subjects of the Sultan of Muscat the right to fly the French flag had been restricted by a previous treaty. The award of the Tribunal is discussed by Westlake in *Law Quarterly Review*, 23 (1907), pp. 83—87.

³⁰ There may well be other exceptions to the rule of nationality of claims as generally propounded. See, for instance, the Dissenting Opinion of Judge Van Eysinga in the *Panevezys-Saldutiskis Railway Case*, decided by the Permanent Court of International Justice on 28 February, 1939 (Series A/B, No. 76, at p. 16). There is probably no room for the rule of nationality of claims in the case of a treaty regulating the condition of stateless persons. Any signatory of the treaty is entitled to raise the case of an infraction of the treaty—though it is arguable that this does not amount to an espousal of a claim of a private person.

³¹ [1926] A. C. 518.

African case of *Rex v. Christian*³² showed that the full international sovereignty of the administering Power or the requirement of a formal status as a British subject are not essential for maintaining the charge of treason.

In the *Joyce Case* the defence did not fail to draw attention to the consequences which, it was alleged, would follow with regard to the various categories of protected persons if the Court were to accept the main proposition of the Prosecution, namely, that the duty of allegiance is established by protection not only inside but also outside the State. This, it was suggested, would amount to an assertion that all British protected persons owe allegiance to the Crown, at least when they are abroad. Before the House of Lords the Attorney-General appears to have admitted that there was some such connexion. It was not necessary for the House of Lords to pronounce on the matter. In fact it is not certain that the suggested connexion is inevitable and that the decision of the House of Lords in *Joyce v. Director of Public Prosecutions* amounts to more than establishing that an alien already subject to the duty of allegiance because of his residence within the realm continues to owe allegiance if on leaving the realm he applies for and obtains the continued protection of the Crown. In the case of 'protected persons'—such as those from a protectorate or mandated territory—the diplomatic protection which they obtain is not due to any voluntary act of their own (which alone in the case of aliens is an adequate reason for bringing about a duty of individual allegiance), but to a situation which is in the nature of an internationally recognized arrangement in respect of territories which have no *locus standi* of their own in the international sphere. In the case of an alien in the position of Joyce the consequential duty of allegiance is the result of his voluntary act in asking for a continuation abroad of the protection hitherto enjoyed within the realm. In fact the contention by reference to which the House of Lords held Joyce to be guilty of treason was that 'by the holding of a passport he asserts and maintains the relation in which he formerly stood, claiming the continued protection of the Crown and thereby pledging the continuance of his fidelity.'³³ For this reason it does not necessarily follow from the the *Joyce Case* that a foreigner who receives the diplomatic protection of Great Britain by reason of a special arrangement made with his State³⁴ owes allegiance to Great Britain. On the other hand, although an

³² *South African Law Reports* [1924] Appell. Div. 101. In this case the indictment recited that the accused as an inhabitant of the mandated territory of South-West Africa 'owed allegiance to His Majesty King George the Fifth in his Government of the Union of South Africa as the Mandatory thereof under the Mandate conferred in pursuance of the Treaty of Peace with Germany, signed at Versailles on the 28th day of June, 1919, upon His Britannic Majesty for and on behalf of the aforesaid Government of the Union of South Africa.' In *Rex v. Earl of Crewe* [1910] 2 K. B. 576, counsel expressed doubt whether the Chief Segkoma owed allegiance to the King, but the suggestion was not pressed.

³³ [1946] A. C. at p. 371.

³⁴ As would be the case, for instance, if Great Britain were to undertake the diplomatic protection of Dutch subjects in a country in which, because of a state of war or for other reasons, Holland has no diplomatic or consular representative.

inference of this nature is not inevitable, it could not properly be regarded as an unreasonable conclusion. For this is not only a question of reciprocity of benefits and obligation. The alien who receives protection is, as a rule, placed in a particularly advantageous position, because of the assumed relation of confidence, for causing injury to the protecting State if he is so minded. So far as international law is concerned, the case would be amply covered by the protective principle, discussed below, which permits jurisdiction over aliens in the matter of crimes committed abroad and seriously affecting the security of the State.

V.—CRIMINAL JURISDICTION OVER ALIENS FOR ACTS COMMITTED ABROAD.

Assuming that, as the Court held in the *Joyce Case*, an alien who, while abroad, continues to enjoy the protection extended to him within the realm, owes allegiance to the Crown with the result that he may be tried for treason, has an English court jurisdiction to try him? The main contention for the defence in *Joyce v. Director of Public Prosecutions* was that to assume jurisdiction over an alien with regard to a crime committed abroad would be contrary to international law at least as understood by English courts. This aspect of the case constituted the central issue in the pleadings and in the successive judgments. In view of its general importance, it will be considered here in some detail.

In general, English courts have adhered in the past to the principle of territoriality in the matter of jurisdiction with regard to crimes committed by aliens abroad. In *Reg. v. Keyn*³⁵ the Court of Crown Cases Reserved held, by a majority, that there was even no jurisdiction in respect of offences committed by aliens in British territorial waters. The view of some of the majority of the Court was clearly influenced by the belief, for which there was no foundation, that international law does not confer such jurisdiction.³⁶ In *Reg. v. Jameson* the Court, in laying down the rule that 'an Act will not be construed as applying to foreigners in respect of acts done by them outside the dominion of the sovereign enacting' the statute, based that rule on considerations of 'international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own jurisdiction.'³⁷ Whatever may have been the rule of international law on the subject in 1896, there is little doubt that present day international law contains no such absolute prohibition of exercising jurisdiction over aliens for offences committed abroad. What is believed to be the correct legal position is stated in the following terms in the sixth edition of Oppenheim's *International Law* published in 1937, to the effect that the prohibition of the exercise of such jurisdiction 'cannot cover acts done abroad in preparation of and participation in common crimes committed or attempted to be committed

³⁵ (1876) 2 Ex. D. 63.

³⁶ See, in particular, the observation of Cockburn C.J., 2 Ex. Div. at pp. 192—194.

³⁷ [1896] 2 Q. B. 425, 430.

in the country claiming jurisdiction; neither can it cover crimes injuring its subjects or serious crimes against its own safety.'³⁸ This statement expresses also some of the difficulties which confront this branch of the law and which are discussed below.³⁹ In fact, in the previous editions of Oppenheim's treatise the contrary view was stated in the sense that the exercise of such jurisdiction is prohibited altogether. However, recent judicial authority and, in particular, the practically uniform trend of municipal legislation in this matter no longer permit adherence to what has become clearly an obsolete view. In 1927 the Permanent Court of International Justice, in the case of the *Lotus*,⁴⁰ held that there is no rule of international law which prohibits a State from exercising jurisdiction over a foreigner in respect of an offence committed outside its territory. The Court said: 'The territoriality of criminal law is . . . not an absolute principle of international law, and by no means coincides with territorial sovereignty.'

There is general agreement that international law recognizes the right of every State to assume protective jurisdiction when its security is concerned and to punish foreigners for serious crimes against its interests, its peace, and its institutions. Most States, in Europe and elsewhere, have enacted express legislation to that effect.⁴¹ Courts of the United States, which otherwise adhere to the territorial conception of jurisdiction, have increasingly stressed and acted upon the doctrine of protective jurisdiction.⁴² The Permanent Court of International Justice, in the *Lotus* case, declared the exercise of such protective jurisdiction to be consistent with international law. The Institute of International Law adopted in 1931 a Resolution according to which every State has the right to punish acts committed outside its territory if such acts constitute an attack upon its security even if they have been committed by aliens and even if they are not punishable by the law of the country where they have been committed.⁴³ In view of this it is almost an understatement to hold, as did the House of Lords, that 'no principle of comity demands that a State should ignore the crime of treason committed against it outside its territory.'⁴⁴ There is no doubt that if Joyce had been the citizen of a State capable of challenging the action of English courts in the matter and that if such a challenge had been attempted, an international court would hold that the assumption, in such circumstances, of jurisdiction for treason committed abroad by an alien was fully in conformity with international law. 'In such circumstances'—for it is not suggested that a State is entitled to extend in all circumstances its law of treason to aliens abroad and to treat them, at will, as bound by

³⁸ Vol. I, § 147.

³⁹ See pp. 345—347.

⁴⁰ Series A, No. 10, of the Publications of the Court.

⁴¹ For a survey of the relevant legislation see Harvard Research in International Law, *Jurisdiction in Respect of Crime* (1935) Comment on Article 7.

⁴² See, in particular, *United States v. Bowman*, 260 U.S. 94, 98.

⁴³ *Annuaire de l'Institut de Droit International*, (1931) (2) p. 128.

⁴⁴ [1946] A. C. at p. 372.

obligations of allegiance. What is submitted is that if there are adequate reasons for holding an alien to duties of allegiance—for instance, in the case of an alien continuing outside the realm the relation of protection which he enjoyed there—international law will attach no importance to the principle of territoriality of crime and will not deny to a State the right to exercise jurisdiction over an alien with regard to acts committed abroad.

The issue might have been more doubtful at the end of the nineteenth century when the principle that a State may assume what is occasionally described as protective jurisdiction over aliens for crimes committed against the security of the State was not as widely adopted and as generally acknowledged as it is now.⁴⁵ This change of emphasis is due, among other reasons, to the fact that with the technical developments in the field of communications and of transmission of news and sound by telegram, telephone and wireless, the importance of mere physical distance—and, therefore, of the territorial principle—has correspondingly diminished. In the *Joyce Case* the Lord Chancellor alluded to the implications of that change. He said: 'It would, I think, be strangely inconsistent with the robust and vigorous common-sense of the common law to suppose that an alien quitting his residence in this country and temporarily on the high seas beyond territorial waters or at some even [?] distant spot now brought within speedy reach and there adhering and giving aid to the King's enemies could do so with impunity.'⁴⁶

The impact of the technical changes referred to above is such that much of the object of protective jurisdiction with regard to acts committed by aliens abroad may be achieved, in a somewhat unexpected way, through the doctrine of the locality of the act as determined not by the place of its causation but by the *situs* of its effect. This applies, in particular, to offences committed by means of broadcasting. There is abundant authority, in decisions of English courts, to the effect that, for the purpose of jurisdiction in the sphere of criminal law, the decisive factor is not the place where the offence was commenced but the place where it was consummated. That principle, acknowledged by Coke⁴⁷ and acted upon in a number of early cases,⁴⁸ was first made applicable to the question of venue. Later on, mostly in cases relating to extradition, the same principle was applied in the international sphere in the form of the proposition that a person may commit a crime in a country without

⁴⁵ In Lord Macmillan's judgment in *The Cristina* [1938] A. C. at pp. 496—498, there will be found an interesting exposition of the view that English doctrines in matters related to international law ought to take into account the various developments in the international sphere.

⁴⁶ [1946] A. C. at p. 369.

⁴⁷ *Instit.* 2, 318.

⁴⁸ In *Coombe's Case* (1 Leach 336) it was held that a person standing on the shore and shooting and killing another person, who died on board a ship, was within the jurisdiction of the Admiralty. In *Reg. v. Keyn* (L. R. 2 Exch. Div. 63) some of the judges—in particular Denman J. and Lord Coleridge—relied on that principle.

being physically present there.⁴⁹ This practice is not a peculiarity of English law. In the words of a leading authority on the subject, 'the principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries.'⁵⁰ In particular, the Courts of the United States have applied it repeatedly and on an increasing scale.⁵¹ The Courts of Germany have acted upon it with characteristic thoroughness—a practice which includes a case of the conviction of a person who shouted 'Vive la France' in France near the German border and who was found guilty of sedition on the ground that the cry was heard in Germany and, accordingly, took effect there.⁵² Legislation in numerous countries, including various States of the American Union, has expressly adopted that principle. There is international authority—in the Judgment of the Permanent Court of International Justice in the *Lotus Case*—in support of the extension, by reference to the place of effect, of the territorial principle. In that case the Court accepted as a valid proposition of law that 'it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there.'⁵³ Broadcasting is an instance of an act which is inoperative and meaningless unless consummated, through appropriate mechanical devices, in the country where it is intended to be heard.⁵⁴ To

⁴⁹ *R. v. Nillins* (1884) 53 L. J. M. C. 157; *R. v. Godfrey* [1923] 1 K. B. 24. See also *R. v. Oliphant* [1905] 2 K. B. 67, and other cases cited in Russell on *Crimes*, Vol. I (8th ed.), p. 55. There is also a number of Scottish and Irish cases. As to the latter see *County Council of Fermanagh v. Farrendon* [1923] 2 Ir. Rep. 180 (with references to English cases). And see Beckett in *British Year Book of International Law*, 6 (1925), pp. 44—60.

⁵⁰ Moore, *Report on Extraterritorial Crime and the Cutting Case* (1887) p. 23; *U.S. For. Rel.*, 1887, p. 771.

⁵¹ *People v. Adams* (1846) 3 Den. (N.Y.) 198; 1848, 1 Comst. (N.Y.) 173—a leading case—where the accused had made false representations in Ohio through an innocent agent in New York whereby money was obtained fraudulently in New York; *Simpson v. State* (1893) 92 Ga. 41, where the accused stood on the South Carolina bank of the Savannah River and shot at a person in a boat on a part of the river within the boundaries of Georgia. (The Court said: 'The well-established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation accompanies the same to the point where it becomes effectual'); *Ford v. United States* (1927) 273 U. S. 593—aliens prosecuted in the United States for conspiring abroad with persons inside the United States to violate the United States prohibition and tariff laws; *Strassheim v. Daily*, 221 U. S. 280, 285 ('Acts done outside a jurisdiction, but intended to produce or producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power': per Mr. Justice Holmes); and many others.

⁵² *Decisions of the German Supreme Court in Criminal Matters*, vol. 20, p. 146.

⁵³ Publications of the Court, Series A, No. 10, p. 23.

⁵⁴ The nature of radio communication was considered in *In re Regulation and Control of Radio Communication in Canada* [1932] A. C. 304. See also *Horwitz v. United States* (1923) 63 F. (2d.) 716, in which, apparently, the defendant had operated a wireless station in a place in Mexico from which they broadcast to listeners in the United States

refuse to apply to broadcasting the principle of the locality of the offence as a test of jurisdiction would mean to render the State and its subjects unprotected against new instrumentalities of science. It is at this point that there may be noted a suggestive convergence of the two independent grounds of jurisdiction—that of protective jurisdiction and that based on the locality of the effect of the act. It did not prove necessary for the Crown in the *Joyce Case* to invoke that latter basis of jurisdiction.⁵⁵ However, its implications are worth noting.

VI.

While the position in international law—the main point relied upon by the defence in the *Joyce Case*—is fully in accordance with the decision of the House of Lords, it is proper to attempt to answer the more limited question, namely, whether so far as English law is concerned the judgment did not amount to an assumption, by way of judicial legislation, of a hitherto dormant or non-existent jurisdiction. It may not be sufficient to say that although Great Britain has in the past, in deference to what English courts believed to be a rule of international law, declined to exercise jurisdiction in the case of offences committed by aliens abroad, the position in international law has changed and that, therefore, if an English court were now to express an opinion that it has no jurisdiction over an alien for an act committed abroad and affecting the security of the realm it would be expressing a view clearly out of keeping with generally recognized practice and opinion. For there may be a strong suspicion of dialectics in the insistence that what has changed is not the attitude of the courts but international law on the subject and that as in the past so also in the *Joyce Case* the courts merely gave effect to international law. This may be true, but the explanation may be somewhat ingenious when adduced in relation to what may appear to some a judicial innovation in the sphere of criminal law.

A more convincing answer is that the *Joyce Case* is not a case of assumption of jurisdiction over an alien pure and simple, but over an alien who, by reason of the relation of protection in which he had placed himself, acquired a status in many ways indistinguishable from that of a

solicitations to participate in a lottery. And see McCain in *Air Law Review*, 11 (1940) pp. 144—153. Some aspects of this question are discussed lucidly by Professor Preuss in *Transactions of the Grotius Society*, 30 (1944) pp. 184—208.

⁵⁵ It was probably by reference to that latter ground of jurisdiction that the alternative count of the indictment, based on the Treachery Act, 1940, was drafted. On the instruction of Mr. Justice Tucker in the Central Criminal Court, that count was not proceeded with pending the hearing of the case under the Treason Act, 1351. See p. 144 of the official transcript of the proceedings. The Treachery Act, 1940, applies to activities calculated, by their effect in the United Kingdom, to assist the military, naval, or air forces of the enemy, to impede British forces, or to cause loss of life. The offence, wherever begun, must, according to the Act, be committed in the United Kingdom. The indictment under the Treachery Act would have proceeded on the lines of the argument that the act of broadcasting from Germany was consummated and, therefore, committed in the United Kingdom. It must remain a matter of speculation whether, if the result of the indictment under the Treason Act had been different, the Crown would have proceeded with the indictment under the Treachery Act.

subject: It has been shown that, so far as English law is concerned, there is no innovation implied in the assimilation, for the purpose of allegiance, of an alien enjoying the protection of the State to a national. This is a case of an application of the well-established principle of correlation of allegiance and protection to a somewhat novel set of facts. There was no question here of an imprudent man being caught within the meshes of a technicality. The Resolution of the Judges of 1707 was not the source of the decision; it was resorted to as an illustration of a wider principle. The Court expressly declined to adhere to what would have been a somewhat technical rule of law, namely, acquisition of British nationality (and of the corresponding obligation of allegiance) by estoppel.⁵⁶ Formal principles of law are a questionable ground for proceedings in State trials even if the accused may be driven to base his case on the letter of the law. Yet, though it is not believed that the decision in the *Joyce Case* is open to criticism on the ground either of retroactive judicial legislation or of reliance on technicalities, there is probably no reason to deplore unduly the volume of criticism to which it gave rise. Suspicion of judicial legislation in treason trials—where more than anywhere else the relentless machine of the State and of ‘reason of State’ has been used to crush human freedom—is a healthy sign of that eternal vigilance on the part of public opinion which is the sole guarantee of the maintenance of a true rule of law. In the long run the inherent merits of a sound judicial decision will assert themselves over criticism both factious and well-intentioned.⁵⁷

What is more important, both generally and for the purposes of the present article, is the question of the exact extent of the decision in the *Joyce Case* in the matter of territoriality of jurisdiction in relation to crimes committed by aliens abroad. That decision, it is well to bear in mind, cannot be adduced in support of the proposition that a State has unlimited jurisdiction over an alien for acts which have been committed abroad and which it considers to be prejudicial to its safety.⁵⁸ There is no warrant in international law for a rule of such alarming comprehensiveness. An individual in one State cannot be expected to exhibit scrupulous care in respecting the interest of other States or to incur the dangers of criminal prosecution in case he should, voluntarily or involuntarily, come into the power of those States. On the other hand, if a person acts in

⁵⁶ See F. O. 83/2216 for an Opinion of the Law Officers of the Crown of 31 January, 1863, approving of the view that the claimants were ‘morally estopped from denying their citizenship, for the purpose of evading liabilities, to which they would be legally subject, if the profession of citizenship, on the faith of which they have enjoyed political franchises, had been true.’

⁵⁷ On the other hand, there is room for the view that ultimately the authority of the law depends on the support given to it by public opinion and that criticism must therefore be studiously and painstakingly informed—especially in face of a practically unanimous decision of the Judges in all three instances. It will be noted that the Dissenting Judgment of Lord Porter expressed agreement with the major principle on which the decision of the House of Lords was based.

⁵⁸ It may be emphasized once more that in *R. v. Joyce* the Court was not confronted with the case of an alien *tout court*.

such a manner as seriously to threaten the security of another State, he must be deemed to act at his peril—for instance, if he is an active party to a revolutionary conspiracy or to military espionage. The test cannot properly be whether such acts are permitted by the law of the State where he resides.⁵⁹ For States are not, as a rule, in the habit of penalizing acts prejudicial to the safety of other States except in the case of active participation in hostile expeditions.⁵⁹ The test is whether such acts constitute a *serious* injury or threat of injury to the State or its citizens. It must be a matter for judicial agencies, national and international, to determine in particular cases whether that test has been complied with.⁶¹

⁵⁹ A test suggested in the Harvard Research Draft, *op. cit.*, p. 543.

⁶⁰ See the writer's article in *American Journal of International Law*, 22 (1928) pp. 105—130.

⁶¹ It would be in accordance with an enlightened principle of justice—a principle which has not as yet become part of the law of nations—if, in the absence of effective extradition, the courts of a State were to assume jurisdiction over common crimes, by whomsoever and wherever committed, of a heinous character. Territoriality of jurisdiction is a rule of convenience in the sphere of the law of evidence. It is not a requirement of justice or even a necessary postulate of the sovereignty of the State.

PRECEDENTS IN THE COURT OF APPEAL

A. L. GOODHART

IT was not until 1898 that the rule that the House of Lords is absolutely bound by its own judgments was finally established in *London Street Tramways Co., Ltd. v. London County Council*.¹ The justification for this rule was stated by Lord Halsbury L.C. in these words:² 'What is that occasional interference with what is perhaps abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal?' It is strange that the Lord Chancellor did not refer to the fact that although the Judicial Committee of the Privy Council is, for constitutional reasons, not absolutely bound by its own judgments, nevertheless no 'disastrous inconvenience' has followed from this. In practice the Judicial Committee follows its own prior judgments unless they are clearly wrong, but it does so on the ground of reason rather than on that of absolute authority.³

Another justification for the rule as applied in the House of Lords was stated by Lord Campbell in the earlier case of *Beamish v. Beamish*⁴ when he said: 'The law laid down as your *ratio decidendi*, being clearly binding on all inferior tribunals, and on all the rest of the King's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law and legislating by its own separate authority.' This peculiar constitutional doctrine can perhaps be explained on the ground that Lord Campbell was speaking at a time when judges were still repeating the fiction that the sole function of the judiciary was to declare the already existing law which in theory covered all possible cases; to-day we realize that there are many instances where judges must make the law, and that if they are under a duty in certain circumstances to make the law, it is only reasonable that they should have the lesser power to alter the law they have made. To take an analogy, a Parliament which was absolutely bound not to alter the laws it had made would be an absurdity, especially in a world where conditions change as rapidly as they do at the present time, and if this were the rule, then some means would have to be found for introducing the necessary changes. In the case of the House of Lords this can be done by the uncertain, expensive, and dilatory method of

¹ [1898] A. C. 375.² At p. 380.³ For a statement concerning the practice in the Judicial Committee of the Privy Council see *Att.-Gen. of Ontario v. Canada Temperance Federation* (1946) 62 T. L. R. 199.⁴ (1861) 9 H. L. C. 274, at pp. 338—339.

legislation,⁵ but how much simpler it would be if the House had the power to reconsider occasionally the wisdom of the rules of law it had itself established.

Perhaps no more effective attack on the rule can be found in the books than in Lord Wright's essay on *Precedents*.⁶ He sums up his criticism in these words:⁷ 'As to Lord Campbell's constitutional argument, I shall only say that I feel that it is at best artificial and at worst doubtful. As to Lord Halsbury's quite different justification, I feel that there is greater public inconvenience in perpetuating an erroneous⁸ judicial opinion, than the inconvenience to the court of having a question, disposed of in an earlier case, reopened.'

This brief statement of the reasons which have been advanced in favour of the rule of absolute precedent in the House of Lords and of the criticisms which have been made against it may be a convenient introduction to a consideration of the cognate rule in the Court of Appeal. Although it is obvious that the constitutional reason advanced by Lord Campbell is inapplicable in the case of the Court of Appeal, and the argument based on finality is far less cogent, nevertheless the fact that the House of Lords regards itself as absolutely bound by its own judgments has influenced the Court of Appeal to adopt a similar position. Moreover, the few statements on this question which have been made in the Court of Appeal seem to have been framed in language similar to that used in the *London Street Tramways Co., Ltd.*,⁹ case in the House of Lords. There is therefore a close relationship between the rules concerning the authority of precedents in the two courts.

The question whether the Court of Appeal is absolutely bound by its own prior decisions was finally decided in the affirmative by the full Court of Appeal in 1944 in *Young v. Bristol Aeroplane Co., Ltd.*¹⁰ In reaching this conclusion the Court of Appeal did not discuss the wisdom of the rule or the grounds on which it was based, but contented itself

⁵ In his Presidential Address to the Holdsworth Club on 'The Limits of Precedent' (1943) Viscount Simon L.C. said 'To those who find it astonishing that the House of Lords, sitting judicially, should reaffirm a proposition of law that later argument might show to be wrong, there are two answers. First, when the House of Lords has once laid down the proposition, it is no longer wrong: it is the law and everybody should proceed on that footing. And, secondly, the cure for these difficulties, if cure is needed, is by legislation which amends the decision by putting a different statutory provision in its place.' Concerning Lord Simon's first point one may perhaps refer to Holt, C.J.'s statement in *City of London v. Wood* (1701). 'An Act of Parliament can do no wrong, though it may do several things that look pretty odd.' With all respect, Lord Simon fails to point out that though a judgment may no longer be wrong if pronounced by an infallible court, nevertheless it may continue to be inconvenient. The strength of the common law has been its development through the method of trial and error: if precedents are made absolutely binding, then the possibility of trial is abolished and all the emphasis is placed on error. Lord Simon's brief reference to amendment by legislation hardly does justice to the difficulties inherent in this process.

⁶ (1942) 4 University of Toronto Law Journal, 247.

⁷ *Ibid.* at p. 276.

⁸ If we may say so, it is not only the erroneous judicial opinion which is inconvenient. The opinion which has become out of date owing to the changing circumstances of the times is an equal, and sometimes a greater, hindrance to the development of the law.

⁹ *Supra*, n. 1.

¹⁰ [1944] K. B. 718.

with a brief quotation from Lord Cozens-Hardy M.R.'s judgment in *Velazquez, Ltd. v. Inland Revenue Commissioners*¹¹ that: 'When there has been a decision of this court upon a question of principle it is not right for this court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law.'¹²

In the case of the House of Lords finality may be achieved, however inconvenient this may be, but in the case of the Court of Appeal there is, as a general rule, the possibility of a further appeal, so that it is rather difficult to understand in what sense Lord Cozens-Hardy used the word here. When the Court of Appeal follows a precedent, which is recognized by everyone including itself as erroneous, the finality only lasts until the appeal can be heard in the House of Lords. Perhaps a more accurate word would be *uniformity*, because if the Court of Appeal always decided the same problem in the same way it will have achieved complete uniformity. Whether this uniformity is such an absolute virtue that reason and justice must be sacrificed to it in all cases is perhaps a doubtful question.

In the present case the Court of Appeal did not, however, discuss the wisdom of the rule, but reached its decision solely on the ground of authority, Lord Greene M.R. saying:¹³ 'Cases in which this court has expressed its regret at finding itself bound by previous decisions of its own and has stated in the clearest terms that the only remedy of the unsuccessful party is to appeal to the House of Lords are within the recollection of all of us and numerous examples are to be found in the reports.' Lord Greene M.R. cited a number of cases in which the Court of Appeal had expressed the fervent hope that the judgments which they were delivering would be reversed by the House of Lords.¹⁴ These cases, of course, prove that for many years the Court has assumed that it is absolutely bound by its own prior decisions, and that therefore in expressly reaching that conclusion in the present case the Court was merely following well-established authority. But the fact that, as Lord Greene M.R. emphasized, these cases are so numerous, does cast some doubt on the wisdom of the rule, because while there might be considerable justification for it if the court were only bound by a rare error, there is much less justification for it if these cases are of fairly frequent occurrence. It may therefore be said that the more of these cases there are that prove the existence of the rule, the more there are that prove it to be inconvenient.

There have, of course, been many instances where the Court of Appeal

¹¹ [1914] 3 K. B. 458.

¹² *Ibid.* 461.

¹³ [1944] K. B. at p. 723.

¹⁴ In *Perrin v. Morgan* [1943] A. C. 399 the House of Lords reversed the judgment of the Court of Appeal which had held that in a will the word 'money' must be construed in a narrow sense. In the Court of Appeal Lord Greene M.R. had reached his conclusion 'with great regret,' holding that the rule was 'a blot upon our jurisprudence.' If a large sum had not been involved in this case there might not have been a further appeal, with the result that the blot would have remained indefinitely. The unfortunate beneficiaries, who found the estate depleted by the heavy costs of an appeal to the House of Lords, must have felt some doubt concerning the value of the rule of binding precedents.

has for all practical purposes overruled a prior decision by saying that it has been decided on its special facts, but such cases do not invalidate the authority of the rule. The only case which can be cited in which there is a clear repudiation of the rule is *Wynne-Finch v. Chaytor*¹⁵ in which Stirling L.J., in delivering the judgment of the court, said: 'With the greatest respect, we are unable to agree with *Daglish v. Barton*,¹⁶ and think that it ought not to be followed; and it is, therefore, over-ruled.' There have also been a number of dicta to the same effect,¹⁷ but the great weight of authority is undoubtedly on the other side.

If it is assumed that a decision must always be based on authority and on nothing else then the conclusion reached in the present case cannot be criticized but it is this assumption itself which has occasionally been questioned. If the Court of Appeal had been prepared to discuss the reasons on which the binding rule of precedent was based is it so certain that it would have reached the same conclusion? It is to be regretted that no reference was made in the judgment to any reasons, except to Lord Cozens-Hardy's reference to *finality*, for we are left with the conclusion that the only express reason why the Court of Appeal is absolutely bound by its own decisions is because this has been stated in other cases which are assumed to be absolutely binding.

It is not, however, strictly accurate to say that the Court of Appeal is always bound by its own prior judgments because there are three exceptions to this rule. These are stated as follows by Lord Greene M.R.:¹⁸ (1) The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3) The Court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*. These three exceptions, like the rule itself, are based solely on authority, and no reasons are given for them in the present judgment. It may therefore be of interest to see how they work in practice. All the references will be to recent cases so that the immediate practical interest of this problem may be emphasized.

(1) *The Court is entitled to decide which of two conflicting decisions it will follow.*

If the general rule is based on 'finality' then there is much to be said for a further provision holding the Court absolutely bound by its last judgment, even though this might be in conflict with a prior one. Thus counsel, having discovered after some effort¹⁹ which was the most

¹⁵ [1903] 2 Ch. 475, 485.

¹⁶ [1900] 1 Q. B. 284.

¹⁷ Greer L.J. was convinced that the Court of Appeal had the power to overrule its own prior decisions if it was convinced that they were wrong. He said so in *Newsholme Bros. v. Road Transport and General Insurance Co.* [1929] 2 K. B. 356, 375, and in *Re Shoesmith* [1938] 2 K. B. 637, 644.

¹⁸ [1944] K. B. at p. 729.

¹⁹ This may prove very difficult as no complete index of the judgments delivered in the English courts has been made.

recent case on the point at issue decided by the Court, would be entitled to feel that he was on reasonably safe ground. It is true that this decision might be an obviously inconvenient and unjust one, but it would at least have the merit of certainty. But that is not the way the rule works in practice because if the opposing counsel or the Court itself has discovered an earlier conflicting precedent then the most recent one is not binding on the Court. *King v. King*²⁰ is a good illustration of the way the rule and the exception work in practice. Incidentally this case also emphasizes the delightful uncertainty introduced into the law by the present haphazard method of recording judgments in the Court of Appeal which, although absolutely binding on that Court itself and on all inferior Courts, may be hidden away in some barrister's unpublished notes.²¹ In the *King* case the question was whether a husband who is appealing from the judgment dismissing his petition for divorce can be required to give security for the wife respondent's costs. It is obvious that if he cannot be required to do so then the wife may find herself placed in a difficult situation, but in 1923 in *Shufflebotham v. Shufflebotham*²² the Court of Appeal had reached the conclusion that, in spite of this hardship, there were no grounds on which a husband could be required to give such security. Therefore, when this point was again raised in the Court of Appeal in the *King* case it seemed that the Court was absolutely bound by the *Shufflebotham* case to reach the same unfortunate conclusion. The hearing was postponed so that the case could be heard by the Full Court, and it was then providentially discovered that in 1921, in the unreported case of *Vidal v. Vidal*,²³ the Court of Appeal had reached the opposite conclusion. The *Shufflebotham* case therefore ceased to be an absolutely binding authority, and the Court in the *King* case could fortunately refuse to follow it. This case throws an interesting light both on the main rule and on the exception. It shows that the main rule may force the Court to perpetuate an obvious injustice unless by some chance it can avoid the rule by finding another conflicting precedent. If in case *A* the Court reaches a desirable conclusion and in case *B* an undesirable one, then in case *C* it may return to the desirable one, but if there is only case *B*, then in case *C* it must, however, clear the disadvantage, again reach the undesirable conclusion. It is difficult to justify this distinction on any other ground than that of authority.²⁴ The *King* case also shows that the exception destroys the

²⁰ [1943] 2 All E. R. 253.

²¹ In 1939 the Lord Chancellor appointed a committee presided over by Simonds J. (now Lord Simonds) to consider the method of reporting cases. In its Report (17 March, 1940) the Committee, with a single dissent, reached the conclusion that the present method of relying on unofficial reporters, who might or might not report a judgment, was a satisfactory one. On this point see the comments of Sir William Holdsworth in his *Essays in Law and History*, 1946, pp. 290 *seq.*

²² (1923) 128 L. T. 642.

²³ The only reference to this case was in the *Times* newspaper. Strange to say the *Vidal* case had been heard by the Full Court of Appeal presided over by Lord Birkenhead L.C. See an interesting note on this case by Dr. C. K. Allen (1943) 59 L. Q. R. 308—311.

²⁴ In *Battersby v. Anglo-American Oil Co., Ltd.* [1945] K. B. 23, the Court of Appeal refused to follow its own previous decision in *Holman v. George Elliot & Co., Ltd.* [1944]

certainty which is the sole justification for the main rule, because counsel who may have every reason for believing that in the most recent decision of the Court of Appeal he has a binding authority in his favour, may suddenly find that a previous unreported case, which he has had no opportunity of finding in the books, has undermined his whole position.

A second case also illustrates how the exception destroys the certainty and uniformity on which the main rule is supposedly founded. In *Rothwell v. Caverswall Stone Company, Ltd.*,²⁵ an injured workman was so negligently treated at a hospital that it was not realized that he was suffering from a fractured dislocation of the shoulder; when the dislocation was finally discovered it was then too late for treatment. On an application for compensation under the Workmen's Compensation Act, 1925, the County Court judge held that the applicant was not entitled to compensation because at the time of the arbitration his existing incapacity was due to negligence on the part of the surgeon and not to the original accident. The point at issue here is obviously a most interesting one, involving as it does the vexed question of the *novus actus interveniens*; it is not surprising, therefore, to find that the judgments in the Court of Appeal occupy eighteen pages. But when we read those judgments we find that they are primarily concerned with the question whether *Humber Towing Co., Ltd. v. Barclay*²⁶ and *Rocca v. Jones & Co., Ltd.*,²⁷ were absolutely binding on the Court in the instant case. Scott L.J., while not disputing that those cases were directly in point, held that they were inconsistent with other decisions of the Court of Appeal, and that therefore in the present case the Court was free to decide which principle it wished to follow. *du Parc* and *Luxmoore L.JJ.* held, however, that there was no conflict, and that therefore the cases cited, whether right or wrong, must be followed. The majority judgments held that the Court in 1944 was absolutely bound to follow a decision made in 1914, in spite of the fact that in the intervening thirty years the judicial approach to the Workmen's Compensation Act cases has altered in many ways. Thus a conclusion which was generally accepted as correct in 1914 might be regarded as in conflict with the modern development of the law: nevertheless it must be followed to-day. This case also shows that the exception has destroyed the convenience and certainty which the main rule was supposed to give to the law, because more time was occupied in the discussion whether there was a conflict between the previous judgments than would have been necessary to decide the point at issue itself. This method of deciding cases solely on absolute authority tends to give to

K. B. 591, on the ground that the *Holman* case was in conflict with earlier cases. If the court in the *Battersby* case was at liberty to overrule the *Holman* case because the latter was in conflict with previous authority, then in a future case the Court of Appeal will be at liberty to disregard the *Battersby* case because it was in conflict with the *Holman* case. If it had not been for the earlier cases the *Battersby* case would have had to be decided in accord with the clearly inconvenient *Holman* case.

²⁵ [1944] 2 All E. R. 350.

²⁶ (1911) 5 B. W. C. C. 142.

²⁷ (1914) 7 B. W. C. C. 101.

the judgments an interesting sense of mediaeval scholasticism which cannot be found in any of the other social sciences, and which places more emphasis on the exercise of casuistry than it does on the search for truth.

Perhaps the most important recent case on this point is *Fisher v. Ruislip-Northwood U.D.C.*,²⁸ the last of the 'black-out' cases, in which the Court of Appeal overruled three of its own judgments. The story begins in 1916 with *Great Central Rly. v. Hewlett*.²⁹ In that case the railway company, having erected in the highway gate posts which were held to be a nuisance, thereafter obtained a private Act which empowered it to 'maintain' them where they were. During the black-out of the 1914—1918 war the plaintiff's taxicab collided with one of the posts which was unlighted. The House of Lords, reversing the decision of the Court of Appeal in favour of the plaintiff, held that there was no duty on the part of the company to warn users of the highway that there was an obstruction. Lord Parker, of Waddington, after referring to the general principle that a statutory power must be exercised with reasonable care, said that,³⁰ 'Here the risk arises, not from what the company is doing, but from the existence of the gate posts legalized by the Act coupled with the diminution of light necessitated by the exigencies of war.' Lord Sumner said:³¹ 'They were merely to maintain a *status quo*, the natural results of which could not prejudice anybody, for if the place was lighted, no one ought to run into the post at all, since he could see it, and if, owing to fog for example, the place was in darkness, no one ought to be injured by the post since he had no business to drive so fast as to be damaged if he did run into it.' Lord Wrenbury said:³² 'The post was no longer an obstruction to the highway. The legal highway was a road in which there stood a post. Whoever used the highway must use it as a highway with a post in it.' There does not seem to have been any suggestion in the judgments that the case was not one of general application, and the reference to *Moore v. Lambeth Waterworks Co.*³³ shows that their Lordships were following the analogy of a highway dedicated subject to an obstruction.

In 1917 came *Morrison v. Sheffield Corporation*.³⁴ In this case the defendant Corporation had protected some trees, which it had statutory authority to plant in the highway, with dangerous spikes pointing outward. The plaintiff, having walked into the spikes in the black-out, was severely injured. The Court of Appeal affirmed the judgment of the trial Judge in favour of the plaintiff. It would be easy to distinguish the *Morrison* case from the *Great Central Rly.* case on the facts, as it might be said that in the former case, although the Corporation was authorized to maintain and guard the trees, it was not authorized to do

²⁸ [1945] K. B. 584.

³⁰ *Ibid.* at p. 519.

³² *Ibid.* at p. 525.

³⁴ [1917] 2 K. B. 866.

²⁹ [1916] 2 A. C. 511.

³¹ *Ibid.* at p. 523.

³³ 17 Q. B. D. 462.

so in an inherently dangerous manner, while in the latter case the particular post was authorized; but the difficulty is that in the judgments of the Court of Appeal the principle is stated in wide terms which it is hard to reconcile with the judgments in the House of Lords. It is not necessary, however, to discuss this problem at length here, as we are only concerned with the fact that there is difficulty in reconciling the two cases.

Soon after the recent war began 'black-out' cases reached the courts, and in three of them judgments were delivered by the Court of Appeal. The first two were *Greenwood v. Central Service Co.*³⁵ and *Wodehouse v. Levy*,³⁶ in which it was held that the local authority was under no duty to illuminate the refuge. Strange to say, the *Morrison* case does not seem to have been cited to the court in either of the cases. It was, however, cited in the third case of *Lys v. Stepney Borough Council*,³⁷ and was discussed at length both by counsel and in the judgment of the court. It was argued that the *Greenwood* and *Wodehouse* cases were in conflict with the *Morrison* case, and that therefore the court was free to decide the case as it saw fit, but Luxmoore L.J., in delivering the judgment of the Court, said:³⁸ 'If, however, *Morrison v. Sheffield Corporation* is not properly distinguishable from the other cases on the grounds suggested and is in conflict with them, we think that this court is bound in this case, as it was in *Greenwood v. Central Service Co.* and in *Wodehouse v. Levy* to follow the decision of the House of Lords in *Great Central Rly. Co. v. Hewlett*.' In other words, the conflict between the *Morrison* case and the *Greenwood* and *Wodehouse* cases was decided by the Court of Appeal in the *Lys* case in favour of the two latter.

Then four years later in *Fisher v. Ruiship-Northwood U.D.C.*³⁹ the whole picture suddenly changed, the Court of Appeal holding that if a local authority erected a refuge in the highway it had to take reasonable steps during the black-out to warn the public of its existence. After discussing the precedent cases in twenty-eight pages of the Law Reports it reached the conclusion that the *Lys* case was in conflict with the *Morrison* case, and that therefore it need not follow the *Lys* case. It follows that if next year the same question falls to be considered by the Court of Appeal, then it will be free to overrule the *Fisher* case in a judgment of thirty pages on the ground that it is in conflict with the *Lys* case. Where, then, is the certainty which the doctrine of the binding precedent is supposed to give us?

The *Fisher* case extends the exception as stated originally in *Young v. Bristol Aeroplane Company, Ltd.*,⁴⁰ because in that case, in dealing with a possible conflict, Lord Greere M.R. said:⁴¹ 'It is a conclusive answer to this submission that *Kinnell's* case was cited to this court in *Perkins' case*. Mr. Paull's argument, therefore, involves a submission

³⁵ [1940] 2 K. B. 447.

³⁷ [1941] 1 K. B. 134.

³⁹ [1945] K. B. 584.

⁴¹ *Ibid.* at p. 722.

³⁶ [1940] 2 K. B. 561.

³⁸ *Ibid.* at p. 152.

⁴⁰ [1944] K. B. 718.

that in *Perkins*' case this court, with the relevant authorities before it, came to a wrong decision.' It is odd to find that this same argument is accepted by the court one year later in the *Fisher* case, the *Lyus* case being overruled although the relevant authorities had been before the court in that case. It must also be noted that in the *Young* case Lord Greene M.R. said that⁴² 'where the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the case before it—in such a case a subsequent court must decide which of the two decisions it ought to follow,' but in the *Lyus* case the Court of Appeal did not act in ignorance of the previous *Morrison* case, having discussed it at great length. Nevertheless the *Lyus* case was overruled.

There seems therefore to be a conflict between *Young v. Bristol Aeroplane Co. Ltd.*,⁴³ and *Fisher v. Ruislip-Northwood U.D.C.*⁴⁴ as to what kind of conflict will entitle the Court of Appeal to disregard its most recent precedent: the *Young* case says that the conflict must be due to ignorance of the previous decision, while the *Fisher* case holds that the conflict is effective even though the previous decision has been called to the attention of the court. There is something to be said against each of these views because the difficulty with the *Young* exception is that we can never be certain whether the previous decision has been cited to the court unless the report of the case is a very detailed one, while the difficulty with the *Fisher* doctrine is that it weakens the certainty which the main rule purports to give us. It even destroys the authority of the *Young* case itself, because in that case the court acknowledged that *Wynne-Finch v. Chaytor*⁴⁵ was in conflict with the conclusion it had just reached; does that mean that in a future case the Court of Appeal may disregard the *Young* case, and hold that as there has been a conflict in previous decisions, it is not absolutely bound by its prior judgments?

This exception, while enabling the Court of Appeal to avoid an inconvenient precedent, destroys the certainty which is the sole justification of the main rule. Moreover, it is a difficult one to work in practice because the learned Lords Justices may not be in agreement as to whether or not there is a conflict. The considerable number of cases within the past few years in which there was a division of opinion on this point shows how inconvenient it is. An absolute rule concerning precedent authority has at least the virtue of certainty: a semi-absolute precedent has no more virtue than a semi-fresh egg.

- (2) *The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords.*

It is clear that if the House of Lords has expressly overruled a previous decision of the Court of Appeal then that decision can no longer be binding,

⁴² *Ibid.* at p. 729.

⁴⁴ [1945] K. B. 584.

⁴³ [1944] K. B. 718.

⁴⁵ [1903] 2 Ch. 475.

but the exception as stated in the *Young* case goes further than this because it says that the Court of Appeal may refuse to follow a precedent which it thinks has been impliedly overruled. With all respect, this seems to introduce just that uncertainty into the law which the main rule is intended to prevent. It is possible to know with certainty when a case has been expressly overruled, but who can say with any confidence whether or not a case has been overruled by implication? One judge may hold that there is a clear conflict between two cases while another may find no difficulty in reconciling them. It will therefore be impossible to say that a precedent case in the Court of Appeal is absolutely binding until all analogous cases in the House of Lords have been considered, and until it has been determined that no implied conflict exists.

It is interesting to compare the rule as established by the *Young* case with the practice followed in *Velazquez, Ltd. v. Inland Revenue Commissioners*.⁴⁶ In 1901 in *Danubian Sugar Factories v. Inland Revenue Commissioners*⁴⁷ the Court of Appeal, in construing the Stamp Act, 1891, reached the astonishing conclusion that the benefit of a contract to sell land in Roumania was not property 'locally situate out of the United Kingdom,' on the ground that intangible things could have no local situation.⁴⁸ Shortly thereafter the House of Lords, in *Commissioners of Inland Revenue v. Muller & Company's Margarine, Ltd.*,⁴⁹ held that the goodwill of a business in Germany was locally situated out of the United Kingdom. In 1914, in the *Velazquez* case,⁵⁰ the question was whether an agreement for the sale of book debts in the Argentine was situate out of the Kingdom. The Court of Appeal held that it was still bound by the *Danubian Sugar Factories* case.⁵¹ Lord Cozens-Hardy M.R. pointing out that their Lordships in the *Muller* case had not referred to it in their judgments. 'That being so,' he said,⁵² 'I do not think that it would be respectful or right that I should say more than that I think we are bound to follow the decision in *Danubian Sugar Factories v. Inland Revenue Commissioners*, and give leave to the appellant if so advised to present the interesting argument we have heard to the House of Lords.' No appeal was taken in this case, but in 1932 the House of Lords, in *English, Scottish & Australian Bank, Ltd. v. Commissioners of Inland Revenue*,⁵³ had no difficulty in holding that there was a conflict between the *Muller* case, and the *Danubian Sugar Factories* case, which had been followed in the *Velazquez* case, and that therefore both the latter had been overruled. This shows how uncertain is the ground when we are concerned with the question of overruling by implication, because the Court of Appeal had held that there was no conflict while

⁴⁶ [1914] 3 K. B. 458.

⁴⁷ [1901] 1 K. B. 245.

⁴⁸ In reaching this conclusion it was following *Smelting Company of Australia v. Inland Revenue Commissioners* [1897] 1 Q. B. 175 in which the Court of Appeal had held that a licence to work a patent in Australia was not locally situated outside the United Kingdom.

⁴⁹ [1901] A. C. 217.

⁵⁰ *Supra*, n. 44.

⁵¹ *Supra*, n. 45.

⁵² [1914] 3 K. B. at p. 462.

⁵³ [1932] A. C. 238.

the House of Lords regarded it as almost too clear for argument that the cases could not stand together. Lord Macmillan, in discussing the conflict, said:⁵⁴ 'When the *Velazquez* case came before the Court of Appeal the *Danubian Sugar Factories* case, not having been expressly disapproved by this House, was regarded as a still binding authority. . . .' Lord Buckmaster, in referring to the *Smelting Co. of Australia, Ltd.*, case, explained that it had been regarded as still binding because it had not been⁵⁵ 'in terms overruled by *Muller's* case.' Apparently the rule that a case can be overruled by implication is a modern development.

This modern development is illustrated by the recent case *Wilson v. Chatterton*⁵⁶ in which the Court of Appeal held that the widow of a workman who, while working in a beet field, had had an epileptic fit and had been drowned by falling in a furrow half filled with water, was entitled to compensation under the Workmen's Compensation Acts. The court refused to follow its own previous decision in *Lander v. British United Shoe Machinery Co., Ltd.*,⁵⁷ in which it had held that a workman's widow was not entitled to compensation where, owing to an epileptic fit, the workman had fallen down and fractured his skull on the hard floor of a factory. In overruling the *Lander* case Scott L.J. said that it was inconsistent with general principles laid down by the House of Lords, but, with one exception, all the cases he cited had been decided before the *Lander* case was heard. The one exception, *Fife Coal Co., Ltd. v. Young*,⁵⁸ deals with such an entirely different set of facts that no one thought of referring to the *Lander* case either in the arguments or in the judgments. If I may say so, the conclusion reached in the *Wilson* case was undoubtedly a desirable one, but in overruling the *Lander* case on the ground that it was inconsistent with general principles laid down in previous House of Lords cases, the Court of Appeal has made the rule in the *Young* case more uncertain than ever because it is difficult to determine with any precision what cases these general principles cover. It may be said that the *Lander* case showed a less liberal spirit in regard to the workman than was shown in some of the House of Lords decisions dealing with entirely different facts, but does this mean that it had been impliedly overruled?

Perhaps the most striking recent case on this point is *Fitzsimmons v. Ford Motor Co., Ltd.*,⁵⁹ in which the Court of Appeal refused to follow three of its own prior decisions. In 1905, in *Steel v. Cammell Laird & Co., Ltd.*,⁶⁰ the court had held that a workman who gradually accumulated lead poisoning had not suffered an injury by accident within the meaning of the Workmen's Compensation Act, 1897, as it was not possible to indicate any precise time at which the mischief arose and as the occurrence was not an accident. The *Steel* case was followed in 1926 in *Williams v.*

⁵⁴ *Ibid.* at p. 258.

⁵⁶ [1946] K. B. 360.

⁵⁸ [1940] A. C. 479.

⁶⁰ [1905] 2 K. B. 232.

⁵⁵ *Ibid.* at p. 245.

⁵⁷ (1933) 102 L. J. K. B. 768.

⁵⁹ [1946] 1 All E. R. 429.

Guest, Keen & Nettlefolds,⁶¹ and in 1928 in *Cole v. London & North Eastern Rly.*,⁶² Atkin L.J. saying in the latter case:⁶³ 'If we were not bound by authority. I think there is a great deal which might be said for this workman.'

In the *Fitzsimmons* case,⁶⁴ however, Scott L.J., in delivering the judgment of the court, held that the Court of Appeal was not bound by authority as the three cases were not consistent with the decision of the the House of Lords in *Burrell & Sons, Ltd. v. Salvage*,⁶⁵ decided in 1921. The important point to note is that, although the *Steel* case was decided before the *Burrell* case, both the *Williams* and the *Cole* cases were decided after it. Moreover, in both the latter cases the *Burrell* case was distinguished on the ground that in that case the workman had suffered a number of small cuts which were clearly accidental, unlike the gradual accumulation of lead poisoning which the courts held could not be described as accidental. The *Fitzsimmons* case, therefore, seems to hold that a precedent case in the Court of Appeal is not binding if it is impliedly in conflict with a prior case in the House of Lords and even if in the precedent case it has been held that no conflict exists.

In the *Fitzsimmons* case the Court of Appeal has undoubtedly construed the Workmen's Compensation Acts in accord with the modern liberal spirit, but to enable it to do so it has been forced to stretch the exception to the binding precedent rule almost to breaking point. It may be argued from this that such heroic measures are some evidence that the main rule is of doubtful validity. It is hardly surprising to find that a court will make every effort not to be absolutely bound in 1946 by a judgment delivered in 1905, especially as at that time the Workmen's Compensation Act was not interpreted in the same spirit as it is to-day. It is in these developing fields of the law that the rigid straight-jacket of absolute precedents is found most irksome.⁶⁶

(3) *The Court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.*

The obvious illustration for this exception is a case in which the court has disregarded a statutory provision. The exception also applies to

⁶¹ [1926] 1 K. B. 497.

⁶³ *Ibid.* at p. 94.

⁶⁵ (1921) 14 B. W. C. C. 158.

⁶² (1928) 21 B. W. C. C. 87.

⁶⁴ [1946] 1 All E. R. 429.

⁶⁶ In *Noble v. Southern Railway Co.* [1940] A. C. 583 the House of Lords allowed the appeal from the Court of Appeal which had held itself bound by its previous decision in *Clarke v. Southern Rly. Co.* (1927) 26 B. W. C. C. 309. The court had apparently been of the opinion that *Clarke's* case was inconsistent with *Wilson and Clyde Coal Co. v. McFerrin* [1926] A. C. 377, but had nevertheless felt that it ought to follow its own later decisions. In the House of Lords Lord Wright said (at p. 598): 'What a court should do when faced with a decision of the Court of Appeal manifestly inconsistent with the decisions of this House is a problem of some difficulty in the doctrine of precedent. I incline to think it should apply the law laid down by this House and refuse to follow the erroneous decision. But I cannot blame the Court of Appeal for leaving it to this House to point out that the decision in *Clarke's* case was at the time inconsistent with *McFerrin's* case, and is also inconsistent with what this House said later: *Thomas v. Ocean Coal Co.* and *Harmer v. Associated Portland Cement Manufacturers, Ltd.* It is enough here to say that *Clarke's* case was wrongly decided. Indeed the contrary is unarguable.'

'a rule having the force of a statute.' This probably means delegated legislation; it cannot be construed to cover the ordinary common law because if it did, then it would always be open to counsel to argue that an apparently binding precedent was in conflict with the pre-existing law. The Master of the Rolls, in discussing this exception, added:⁶⁷ 'We do not think that it would be right to say that there may not be other cases of decisions given *per incuriam* in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts.' As this exception was left purposely vague it is not possible to say to what cases it is applicable or to what extent it will derogate from the main rule.

These are the three exceptions to the rule as stated in the *Young* case, but in practice there are two other means of avoiding a precedent. The first is by the method of fine distinctions. On this point Lord Wright has said⁶⁸: 'I have heard conveyancers boast that their ingenuity was equal to evading any conveyancing rule and I have heard distinguished judges boasting of the potency of the weapon of drawing distinctions. But it would be more dignified in the judge if he were able to say, with all respect and after anxious deliberation, that it was not safe to follow the earlier case.' An indication of this method is usually found when the court says that the earlier case was decided 'on its special facts.' Thus in *Dover Navigation Co., Ltd. v. Craig*⁶⁹ the Court of Appeal distinguished *Karemaker v. S.S. Corsican*⁷⁰ on its special facts, but when the case reached the House of Lords their Lordships overruled the *Karemaker* case on the ground that it had been wrongly decided.⁷¹

The second method consists in disregarding a precedent on the ground that the decision was one based on the facts and not on law. Perhaps the best illustration of this can be found in the 'collision in the dark' cases. In *Baker v. Longhurst & Sons, Ltd.*,⁷² the plaintiff, who was riding a motor cycle at night, ran into a horse and cart that were being driven in the highway without a light. The county court judge, in giving judgment for the plaintiff, found that he had not been guilty of contributory negligence. As no appeal lies against a county court judge's findings of fact, the Court of Appeal could only reverse his judgment which had been affirmed by the Divisional Court, if it found that he had misdirected himself on a point of law. Scrutton L.J. made this clear when he said:⁷³ 'A county court judge must go wrong in law before

⁶⁷ [1944] K. B. at p. 729.

⁶⁹ [1940] A. C. 190.

⁷¹ The House of Lords was, however, forced to distinguish *Warner v. Couchman* [1912] A. C. 35, saying (at p. 204): 'This House decided that case purely as on a finding of fact.' Another interesting case is *Winter v. Winter* (1946) 62 T. L. R. 336 in which *Bailey v. Bailey* [1926] Ch. 758 was distinguished on its special facts, the court saying, 'the decision is one which we should be reluctant to extend.' Cf. a note on this case in (1946) 62 L. Q. R. 213.

⁷² [1933] 2 K. B. 461.

⁶⁸ *Supra*, n. 6, at p. 276.

⁷⁰ (1911) 4 B. W. C. C. 295.

⁷³ *Ibid.* at p. 465.

his judgment can be interfered with, which involves the proposition that the appellant must satisfy us that, as a matter of law, the evidence was such that the finding that there was no contributory negligence could not stand.' The court thereupon reversed the county court judge's judgment on the ground that the plaintiff, as a matter of law, was guilty of contributory negligence because, as Scrutton L.J. said,⁷⁴ 'either he was going at a pace at which he could not stop within the limits of his vision, or, if he could stop within the limits of his vision, he was not looking out.'⁷⁵ This is the same principle as stated by Lord Sumner in his judgment in the *Great Central Rly. Co.* case.⁷⁶ It is the principle of the case as stated in the headnote in the Law Reports, and it was generally accepted as such by the commentators, some of them suggesting that this rule of law was in conflict with common experience.⁷⁷ A year later the Court of Appeal for all practical purposes overruled the *Baker* case in *Tidy v. Battman*,⁷⁸ the three judgments occupying together less than 30 lines in the Law Reports. Such taciturnity is in itself remarkable. Lord Hewart C.J. in his judgment did not refer to the *Baker* case, and Lord Wright remarked briefly:⁷⁹ 'This is a pure question of fact. The cases of *Tart v. G. W. Chitty & Co.* and *Baker v. E. Longhurst & Sons, Ltd.* show that no one case is exactly like another, and no principle of law can in my opinion be extracted from those cases.' With all respect, while it is, of course, true that 'no one case is exactly like another,' this does not mean that no one case can be based on a principle of law which shall be binding in another case: if this were true then there would, of course, be no precedents. The statement that 'no principle of law can be extracted' from the *Baker* case makes it difficult to understand on what ground the Court of Appeal could have reversed the county court judge because it cannot have done so on a question of fact. There must have been a principle of law which, in the view of the Court of Appeal, he had wrongly applied. Slessor L.J. dismissed the *Baker* case by saying:⁸⁰ 'I have always regarded cases of road collisions due to negligence as questions of fact.' If the court in the *Baker* case had held this view then it would not have been entitled to reverse the county court judge because he had found as a fact that the plaintiff was not guilty of contributory negligence.

I am not suggesting here that the Court of Appeal in the *Tidy* case should have followed the obviously inconvenient decision in the *Baker* case, but what I am attempting to point out is that, owing to the doctrine of the absolute precedent, it could only reach a desirable conclusion by

⁷⁴ [1933] 2 K. B. at p. 467.

⁷⁵ Scrutton L.J. also said at p. 468: 'If a person rides in the dark he must ride at such a pace that he can pull up within the limits of his vision, and if, in those circumstances, he strikes something, either he is going too fast or he has not been keeping a proper look-out.'

⁷⁶ *Ante*, p. 355.

⁷⁷ Cf. (1934) 50 L. Q. R. 5—7, and 159, 160.

⁷⁹ *Ibid.* at p. 322.

⁷⁸ [1934] 1 K. B. 319.

⁸⁰ *Ibid.* at p. 321.

a method not easily distinguishable from that adopted by Lord Nelson at the Battle of Copenhagen.

If in the *Tidy* case the court could have openly overruled the *Baker* case, it would not have been necessary for the Court of Appeal to emphasize twelve years later in *Morris v. Luton Corporation*⁸¹ that there is no 'general proposition that a person riding in the dark must be able to pull up within the limits of his vision.' In his judgment Lord Greene M.R. referred to Scrutton L.J.'s judgment in the *Baker* case in these words:⁸² 'I cannot help thinking that that observation turned out in the result to be a very unfortunate one, because the question, as has been so often pointed out, is a question of fact.' But, with all respect, Scrutton L.J.'s statement of principle in the *Baker* case had been more than an 'observation,' for he repeated it a month later in *Evans v. Downer & Co., Ltd.*:⁸³ 'This Court has said three times, but unfortunately no one has reported those cases, that if the driver of a vehicle proceeded at such a speed that he could not pull up within the limits of his vision he was in the wrong.' What a court says three times may, perhaps, not always be right, but it can hardly be regarded as an unconsidered observation on a question of fact.⁸⁴ That may be the reason why it has been so hard to lay the *Baker* case 'peacefully in the grave'; the law is perplexed by such a case because it cannot be killed once and for all, and therefore no one can tell whether any vitality is left in its mangled remains.⁸⁵

There is much to be said for the view that it is better for the law to be certain than it is for it to strive for 'abstract justice,' to use Lord Halsbury's words, but there is little to be said in favour of a rule which is both uncertain in practice and which may lead to obvious injustice. //

⁸¹ [1946] 1 K. B. 114.

⁸² *Ibid.* at p. 115.

⁸³ [1933] 2 K. B. 465, n. 1.

⁸⁴ A note on *Morris v. Luton Corporation* [1946] 1 K. B. 114 was published in (1946) 62 L. Q. R. 110. Thereafter Messrs. L. Bingham & Co. sent me the following letter:—

'Driving in the Dark.

'With reference to the note under the above heading at pp. 110 and 111 of the April number, as we were the solicitors for the defendants in the case of *Tart v. Chitty & Co.*, and also *Baker v. Longhurst & Sons, Ltd.*, we can confirm that the observation of Scrutton L.J. was not a mere *obiter dictum* but was the principle of the decision. He not only said that it was unfortunate that the earlier cases had not been reported, but expressly asked our counsel, Mr. Tom Eastham, K.C., to make sure not only that *Baker's* case was reported, but *Tart v. Chitty & Co.* also. In consequence we supplied to the reporters the papers and shorthand note of the judgments in both cases. This explains why *Tart v. Chitty*, although decided in June, 1931, was not reported until after the decision in *Baker's* case a year later.

'Incidentally the Scotch Courts still seem to recognize the principle (see *Cowan v. Robertson* (1941) S. C. 502).'

⁸⁵ In *Holdman v. Hamlyn* [1943] K. B. 664 the Court of Appeal for all practical purposes overruled *Bass v. Hendon U. D. C.* (1912) 28 T. L. R. 317, and *Hensmer v. Pickfords, Ltd.* (1920) 36 T. L. R. 818, but it was impossible for it to say so. The text-book writers have never regarded these cases with approval (cf. Winfield, *Law of Torts*, 3rd ed. pp. 129—130, and Salmond, *Law of Torts*, 10th ed. pp. 102—104), and have found difficulty in explaining the principle on which they were based. It may, perhaps, be suggested, with all respect, that it would have been advantageous if these cases had been overruled in specific terms in the present judgments, for text-book writers may well hesitate to omit these references in future editions if the Court is not prepared to express a definite view on the subject.

That the present rule does frequently lead to such injustice has been pointed out by Lord Greene M.R. in the *Young* case⁸⁶ when he cited as proof of the existence of the rule the numerous cases in which the court had expressed regret at the conclusion it was forced to reach. Has the rule given us the certainty which might justify this injustice? Unfortunately this certainty seems to be illusory, as the experience of the past few years has shown. In the cases I have cited, the time of the court has been occupied not with the consideration of what is the correct principle of law to be applied having regard to the previous decisions, but with the more barren discussion whether these previous decisions are absolutely binding.

It may be said, however, that the present rule does little harm because it is always possible for the unsuccessful party in the Court of Appeal to go to the House of Lords. This was the view Lord Cozens-Hardy expressed in the *Velazquez* case⁸⁷ when he said: 'If it is contended that the decision is wrong, then the proper course is to go to the ultimate tribunal, the House of Lords, who have power to settle the law and hold that the decision which is binding upon us is not good law.' Unfortunately this counsel of perfection may break down in practice for three reasons. The first is that the appellant may not be in a financial position to go to the House of Lords. Even if there is every likelihood that he will succeed, he may not be willing to face the risk of bankruptcy which an unsuccessful appeal would entail. Thus in *Lissenden v. C. A. V. Bosch, Ltd.*,⁸⁸ Lord Wright, in speaking of *Johnson v. Newton Fire Extinguisher Co.*,⁸⁹ said:⁹⁰ 'For some reason no litigant has had the courage or the money to bring it before this House, and this unfortunate doctrine of law has remained in force because the remedial powers of this House are dependent on some private litigant at his own expense or initiative bringing up the question by way of appeal. Such is the English system.'⁹¹

The second reason is that the amount involved in the case may be too small to justify the trouble and expense of a further appeal. Thus in the *Velazquez* case⁹² itself the amount at issue was only a stamp tax of £84 10s. It is hardly surprising that the unsuccessful appellant did not adopt Lord Cozens-Hardy's suggestion that he should go to the Lords. As a result it was not until eighteen years later that the House of Lords, in *English, Scottish & Australian Bank, Ltd. v. Inland Revenue Commissioners*,⁹³ had an opportunity of overruling the *Velazquez* case in

⁸⁶ [1944] K. B. 718, 723.

⁸⁸ [1940] A. C. 412.

⁹⁰ At p. 432.

⁹¹ In the *Lissenden* case Lord Atkin said at p. 423: 'My Lords, I am shocked to say that the Court of Appeal felt constrained to accede to this contention being bound by a decision of *Johnson v. Newton Fire Extinguisher Co.* and a series of cases which followed that case which undoubtedly laid down the law as contended for by the respondents.'

⁹² [1914] 3 K. B. 458.

⁹³ [1932] A. C. 238.

⁸⁷ [1914] 2 K. B. 458, 461.

⁸⁹ [1913] 2 K. B. 111.

no uncertain terms. During all these years the Inland Revenue Commissioners collected a tax to which they were not entitled.

The third reason is that the successful party may be so convinced by the arguments in the judgments of the Court of Appeal that they are wrong in deciding in his favour, that he may be prepared to settle with his opponent rather than face the risk of an appeal. It is true that in such a case the unsuccessful party, having been paid, will suffer little injustice, but the unfortunate result will be that the incorrect judgment of the Court of Appeal will remain on the books, acting as a stumbling block to other litigants. I have been told on excellent authority of a case in which a defendant insurance company, having been successful in the Court of Appeal, paid the unsuccessful plaintiff the full amount of his claim and all the costs he had incurred because the binding precedent in the Court of Appeal was of far greater value to it than the sum involved in the particular case. To use a golfing metaphor, the insurance company had effectually stymied all future claimants.

It will be interesting to follow the future career of the *Young* case. The English doctrine of precedent has passed through so many phases in the past that it is unlikely that the present one, which may be said to have reached the high water mark of absolutism both in the House of Lords and in the Court of Appeal, is necessarily a permanent one. If these two courts are amalgamated into a single one, as has been frequently suggested, the whole question of the absolutely binding nature of a precedent may be open for reconsideration.

ANNUAL SURVEY OF AMERICAN LAW¹

P. H. WINFIELD

THE series to which the four volumes that are the subject of this article belong began in 1928, and appeared regularly until their production was held up by the recent war. The publication of the 1940 volume was delayed until 1943. Within the last year, activities have been renewed with such success that the volumes for 1942, 1943, 1944 and 1945 have been forwarded to us. The Foreword of Dean Arthur T. Vanderbilt gives impressive information about the magnitude of the task. He tells us that in 1942 American reported decisions filled seventy-four books totalling 76,362 pages, and that, although the sittings of most of the legislatures were suspended in that year, enactments nevertheless occupied 8,939 pages. Thus, great as is the burden on the editors of our *Annual Survey of English Law* (which Dean Vanderbilt courteously mentions as the source of inspiration of the American *Annual Survey*), it is light compared with that upon the shoulders of those who have to deal with legislation and judicial decisions in over fifty jurisdictions. The aim of each volume of the American *Survey* is modestly described as 'merely to present in orderly fashion the significant trends in the more important branches of the law through the year.' This underrates the scope of the work, for it is gratifying to both practitioners and teachers of law to find included in it chapters on 'Jurisprudence,' 'Legal Education, Bar Organization and Economics,' and 'Administration of Justice—The Courts and Law Reform.' Moreover, account is also taken of outstanding literature in the shape of textbooks and articles in law journals.

We have emphasized the practical importance of the *Annual Survey* to all lawyers of other countries, and especially to English lawyers, in a review of the 1942, 1943 volumes in an American journal, and we make no apology for reproducing what we have said there. In the course of the last generation the tendency of English lawyers to have recourse to American law for help and instruction, has steadily increased. This applies not only to those who teach law or research in it, but also to those who administer it judicially (at any rate in the higher courts), to the leading practitioners at the Bar, and to those concerned with revision of the law. Of course, there has always been an essential mutual interest on both sides of the Atlantic in the Common Law as the plinth upon which both systems have been developed, and there is abundant evidence of that interest in the legal literature of both countries; but during the

¹ Four volumes for the years, 1942, 1943, 1944, 1945. New York University School of Law. Washington Square East, New York. 5 dollars each volume.

half century that has been devoted by the present writer to the study of law the interest has been intensified. It is notable that quite recently the English Court of Appeal closely considered an argument of counsel that a particular rule laid down in the American *Restatement of the Law of Torts* ought to be adopted by the Court in applying the rule in *Rylands v. Fletcher*.² Again, it is common practice for the various Law Reform Committees, appointed by the Lord Chancellor in recent years, to embody in their recommendations the result of their investigations of American law. The American system is naturally more fertile in reported decisions than is English law. Hence, many a point *primæ impressionis* before an English court has already been decided in one or more of the United States. That fact alone makes it helpful for the English practitioner, teacher, researcher and law reformer to have ready access to literature that will inform him of the most recent developments of American law, as the *Annual Survey* does. It may of course be urged that he ought to go direct to the American statutes and law reports and that digests of cases would guide him to the latter. But it must be recollected that very few English libraries contain even a moderately full collection of American reports and statutes. The *Annual Survey*, too, cuts much deeper than digests, useful though they are. It seeks, says Dean Vanderbilt, 'to cut a path through the wilderness of single instances so that the lawyer and the intelligent layman may follow the development of the law subject by subject.'

The editorial committee are to be congratulated on the excellent format of these volumes and on the remarkable achievement of having produced a total of 4,582 pages within two years. The only suggestion we have to make with respect to future volumes is that fuller references might be made in the Index to the pages of the text in which mention is made of the various American Restatements of the law. It is of particular interest to English readers, who are acquainted with the Restatements, to know how the courts treat them. In the four volumes under review there are only two references in the Indexes to mention of the Restatements in the text, although we have encountered several other pages in which the courts have considered them.

It is impossible, with the limited space at our disposal, to give anything like a comprehensive outline of the contents of the four volumes, but it may stimulate readers of this article to consult them, if we select a few instances from each of three important branches of the law—Criminal Law, the Law of Contract and the Law of Tort.

An important step towards making Criminal Law in America 'as flexible and as forward looking as the Borstal system' was taken by the American Law Institute, in 1940, in framing a Youth Correction Authority project, and in recommending its adoption by the various States. So far, however, only California has taken this course, and authorities in New

² *Read v. Lyons & Co., Ltd.* [1945] K. B. 216. See especially the judgment of Scott L.J.

York have launched strong criticisms of the scheme, the leading objections being on the financial and constitutional difficulties that have to be overcome.³ In 1943, however, several States changed their methods of dealing with juvenile offenders, though none of them acceded to the Y.C.A. project.⁴ In the 1944 volume, there is an instructive discussion of criminal negligence in homicide (pp. 981-988). The 'recklessness' on which this negligence is based in English criminal law has received detailed interpretation in several of the American courts. Thus, the Supreme Judicial Court of Massachusetts laid it down, in a trial for manslaughter, that the essence of wanton or reckless conduct is intentional conduct by commission or (where there is a duty to act) by omission, which conduct involves strong probability of substantial harm to another; and that such conduct is equivalent to what has been described as indifference to, or disregard of, probable consequences to that other.⁵

In the 1945 volume, Mr. McKenna prefaces his review of the cases with the remark that, although there were several hundreds of them, they revealed no new trends or startling developments, and that too little attention is being paid to the problem of revising the current substantive law in order to keep in harmony with social changes and new conditions; and he refers in particular to advances in the field of mental disorders, changed medical views as to the causes and effect of intoxication and new social ideas as to family relations.⁶

In the Law of Contract, the New York Court of Appeals considered the doctrine that silence does not establish mutual assent where there is no duty to speak, and held in *Matter of Tanenbaum Textile Co. v. Schlanger*⁷ that a purchaser of goods on twenty-seven occasions was not bound by the following conditions stamped on the invoices of the seller on each of these occasions: 'All controversies arising from the sale of the goods are to be settled by arbitration,' no mention of this having been made at the dates of making the contracts. The Court disregarded an earlier, and much criticised, decision in which it was held that a buyer who received the printed notice on bills, 'Terms cash—accounts overdue subject to payment of interest,' was bound by an implied contract to pay interest.⁸

In the law of consideration, several States still regard moral obligation to pay a pre-existing debt as a valid consideration, and a Nebraska case recognises this,⁹ though, as the Digest notes, the actual decision need not have been based on an unqualified adoption of this principle.¹⁰ With very few exceptions, the principle has no application in English law.¹¹ It is cheering to members of the Lord Chancellor's Law Revision Committee to learn that legislation in some of the States continues to

³ 1942 vol., 744—756, where the whole question of juvenile and adolescent offenders is treated by Mr. Morris Ploscowe.

⁴ 1943 vol., 690, *seq.*, where details are given by Mr. Ploscowe.

⁵ *Commonwealth v. Welansky* (1944) 55 N. E. (2nd) 902.

⁶ P. 1142.

⁷ (1942) 40 N. E. (2nd) 225.

⁸ 1942 vol., 479—480.

⁹ *Krause v. Swanson* (1942) 3 N. W. (2nd) 407.

¹⁰ 1942 vol., 480—481.

¹¹ Pollock, *Contract* (12th ed.), 150—151.

substitute the formality of writing for consideration.¹² Among illegal contracts, most States include wagers, but, although New York statutes forbid wagers, they permit the loser of a bet to recover what he has paid to the winner. The courts have limited this concession to the 'casual,' as distinct from the 'professional' gambler, and it has been held that a lawyer, although he frequently indulged in betting, must be classified as a casual gambler.¹³ This is reminiscent of the inconsistency of policy displayed by English law towards gambling; indeed our law on this matter merely reflects the varying views of the morality of betting held by different sections of the community.

In the doctrine of frustration of contracts, several cases on the application of it to war-time restrictions shew an inclination to release the parties to the contract only where the execution of the contract becomes totally impossible. In *re Kramer*,¹⁴ it was held by a New York Court that where the contract was for the sale of fabrics at a stated price, and before the date of delivery the Government fixed a limit price for the fabrics, which was lower than the contract price, there was complete frustration; on the other hand, an Illinois court refused to absolve the lessee of a garage merely because the wartime restriction made the carrying on of the business more onerous.¹⁵ Again, the tendency of many of the decisions in 1944 was to hold that counter-performance is still due under the contract unless (i) the risk of the frustrating event was not reasonably foreseeable at the date of making the contract; and (ii) the value of the counter-performance is wholly, or almost wholly, destroyed.¹⁶ English law is in effect the same, although (ii) is expressed in rather different terms.¹⁷ In connection with leases, a matter on which *obiter dicta* in the House of Lords were equally divided in *Cricklewood Property, Ltd. v. Leighton's Investment Trust, Ltd.*,¹⁸ was whether the doctrine of frustration can ever apply to leases. In American law, there seems to have been some distinction between leases and other contracts, but the tendency is towards obliterating it, except that frustration is more likely to amount to no more than diminution in value of the use and occupation of the premises than to the complete, or almost complete, loss of their value, which would nullify the contract.¹⁹

A Tennessee case, *Gaston v. Sharpe*,²⁰ is of interest in both the Law of Contract and the Law of Tort, in relation to the loan of a servant by X, his general employer, together with some machine to be worked by the servant for Y, the special employer to whom he is loaned. There have been several recent English decisions on the liability in tort of X or Y for negligence of the servant in working the machine which results in injury

¹² 1944 vol., 603.

¹³ 1942 vol., 485—486.

¹⁴ (1942) 288 N. Y. 467.

¹⁵ *Deibler v. Bernard Bros. Inc.* (1943) 319 Ill. App. 504. 1943 vol., 461.

¹⁶ 1944 vol., 610. See, too, 1945 vol., 696.

¹⁷ Pollock, *op. cit.*, 230.

¹⁸ [1945] A. C. 221.

¹⁹ 1945 vol., 696.

²⁰ (1943) 168 S. W. (2nd) 784.

to a third party.²¹ In *Gaston v. Sharpe*, it was held that the tests for determining whether X had transferred full control of the servant to Y were mere factors in determining where responsibility for the servant's acts lies. Mr. Riggs²² criticises the decision as out of line with the trend of other decisions, and cites the *Restatement of Agency* for the proposition that inference of the continuation of the general employment is to be deduced from the facts that at any time X may substitute another servant for loan to Y, that the time of employment is short, that the loaned servant has the skill of a specialist, that the machine loaned is of considerable value and that part of X's business is letting machines. These are all factors in deciding whether totality of control has been surrendered by X to Y, which is a question of fact although the Tennessee court treated it as a question of law.

In 1944, there were several cases on the right of a third party, upon whom a benefit is conferred by a contract between two other parties, to claim the benefit. According to the *Restatement of Contracts*, §§ 135, 142, assent to the benefit by the third party is presumed so as to vest his rights in the contract and to prevent rescission by the contracting parties. In the 1944 decisions, however, the Courts declined to adopt the *Restatement* rule.²³

Ramsden v. Grimshaw,²⁴ a Washington case, illustrates the American rule that, where a written contract contains a reference to terms not expressly embodied in it (e.g., a railway ticket), the terms referred to do not bind the party accepting the document if they are an illegal attempt of the other party to contract himself out of liability for his own negligence. In this case, the defendant, who had received the plaintiff's automobile under a contract for parking it, was held liable for negligence, although there was a stipulation on the parking ticket given to the plaintiff that the defendant was to be exempted from liability. We have urged elsewhere that English law ought to be to the like effect,²⁵ but there is direct authority the other way.²⁶

In the Law of Tort, the New Jersey case of *Stemmer v. Cline*²⁷ on liability for pre-natal injuries to a child is remarkable as having reached what Mr. Kaufman rightly describes as 'the conventional but unfortunate conclusion.'²⁸ A physician incorrectly diagnosed the pregnancy of the child's mother as a tumour and applied treatment to the mother which resulted in the child being born deaf, dumb, blind and paralysed. In an action by the child against the physician, it was held on appeal that the defendant was not liable. The only thing that mitigates one's regret at the decision is that it was subject to strong dissent. As we have noted

²¹ The most important case is *Mersey Docks & Harbour Board v. Coggins & Gifford, Ltd.* [1947] A. C. 1 (H.L.).

²² 1943 vol., 465—466.

²⁴ (1945) 162 P. (2nd) 901. 1945 vol., 682.

²⁵ *McCawley v. Furness Ry.* (1872) L. R. 8 Q. B. 57. *Callin v. L. & N.W. Ry.* (1875) L. R. 10 Q. B. 212.

²⁷ (1942) 26 A. (2nd) 489, 684.

²³ 1944 vol., 603, 606—610.

²⁵ 55 L. Q. R. 518—520.

²⁸ 1942 vol., 732.

elsewhere,²⁹ there is no English decision on liability for pre-natal injuries, but we hope that a case like *Stemmer v. Cline* would encounter an opposite decision in an English court.

In America, the offensive invasion of personal privacy has long been a tort in several jurisdictions, though Mr. Kaufman regards the law as tending to limit the scope of this wrong.³⁰ That was certainly the effect of *O'Brien v. Pabst Sales Co.*,³¹ where the plaintiff, a college football star, permitted his university to use his picture for publicity purposes. Without his permission, the university director of publicity gave the picture to a beer company, who used it for advertising purposes. It was held that the plaintiff had no remedy, because he was a 'public figure.' Nor did it avail him that he was a member of an organization for abolishing the use of alcohol by young people and that he had already refused \$400 offered by another beer company if he would allow it to use his name for advertisement. In England it is only the House of Lords who can now settle whether offensive invasion of personal privacy is a tort,³² but there is reason to think that, according to our law, the plaintiff in *O'Brien's Case* could have sued successfully for libel.³³

With the increasing prevalence in England of thefts of motor vehicles and of bicycles, it is worth noting that in the United States it was held in *Ross v. Hartman*³⁴ that, where *A*'s car was stolen by *B*, who by negligent driving of it injures *C*, *A* is liable to *C* if it was due to *A*'s negligence that the theft occurred; e.g., where *A* leaves the car parked in a public street, with the ignition unlocked and the key in the switch, contrary to a statutory duty. The decision repudiated the contrary doctrine, which exculpated the owner of the vehicle in a line of earlier cases. It does not appear whether the court in *Ross v. Hartman* would have taken the same view if the duty imposed on *A* were not a statutory one.

A Michigan case, *Brugh v. Bigelow*³⁵ has made an extension of the doctrine of 'rescue' cases, in the Law of Tort, to facts which so far have not been raised in an English court. The point is whether liability for injury caused to the plaintiff in consequence of a reasonable attempt to rescue *X* from danger due to the defendant's negligence extends also to the case where the rescued party is the defendant himself. In *Brugh v. Bigelow*, the defendant's automobile collided with another car, owing to the defendant's negligence. He was pinned beneath his overturned automobile, shouted for help, and the plaintiff was injured in attempting to rescue him. He was held liable to the plaintiff. In considering what ought to be the solution of the question if it should arise in an English court, we are glad to see that we had anticipated elsewhere the decision of the Michigan court.³⁶

²⁹ 8 Cambridge Law Journal (1942), 76—91.

³⁰ 1942 vol., 742.

³¹ (1942) 124 F. (2nd), 167.

³² The matter is discussed in my Textbook of Tort (3rd ed.), § 183.

³³ *Tolley v. Fry & Sons, Ltd.* [1931] A. C. 333.

³⁴ (1944) 139 F. (2nd), 14. 1944 vol., 948.

³⁵ (1944) 310 Mich. 74. 1945 vol., 1105—1106.

³⁶ Textbook of Tort (3rd ed.), 36—37.

In Memoriam

D. T. OLIVER, LL.M., LL.D. (DUBLIN)

MR. OLIVER, whose death we all regret, had a varied career before he took up the teaching of law at Cambridge. He began as a Home Civil Servant, but, finding law more attractive, he took the London LL.B. as an external student, entered the Middle Temple and, on call to the Bar by that Inn, he left the Civil Service and engaged in practice for some years. It was while he was still practising that he came up to Trinity Hall at the age of 37 and was awarded a first-class in each part of the Law Tripos. Although he did not entirely abandon practice at the Bar, he and I returned from London to Cambridge in 1905 and we started teaching law in the same set of lodgings. We continued in this close local contact until some 15 years later, when we became fellows of our respective colleges. I can therefore support from personal knowledge the high tribute paid to his capacity as a teacher of law in the *Times* obituary notice. For many years he was Review Editor of this *Journal*, though latterly, owing to his increasing age, he availed himself gladly of the assistance of Dr. Ellis Lewis, who relieved him of practically all the work on this part of the *Journal*. Mr. Oliver's book on *Roman Law in Modern Cases* is a good illustration of his interest in the practical application of a topic which is too often regarded as of merely theoretical value to any student of English law.

P. H. W.

R. P. F. ROBERTS, M.A., LL.B.

MR. ROBERTS' death was a great blow to the writer of this notice, for it severed, at any rate in this world, a strong personal friendship.

We had known each other many years and our social contact was as close as our touch with one another as lawyers. In the latter capacity, I was much indebted to him for his advice on both published and unpublished work of mine. He had the advantage of experience as a practitioner at the Bar before he became a teacher of law, and both his colleagues and those whom he taught benefited by this. The wide range of his college activities, especially during the recent war, made his life a very busy one, but his work did not prevent him from keeping in close touch with his pupils in spheres outside their work. He frequently played squash with them and shewed sympathetic interest in their other forms of recreation. His College and the Law School have sustained a grievous loss by his premature death.

P. H. W.

NOTES ON RECENT CASES

ADMIRALTY—ACTION IN REM—DAMAGE BY BRITISH SHIP TO PIER IN LAGOS HARBOUR
—ADMIRALTY JURISDICTION OVER BRITISH SHIP FOR DAMAGE DONE IN ANY
WATERS.

The Tollen. [1946] P. 135.

An action *in rem* was brought by the United Africa Co., Ltd., against the owners of the British ship *Tollen*, for damage caused to their wharf in Lagos harbour when the *Tollen*, owing to alleged negligent navigation, collided with it whilst proceeding out to sea. The defendants objected, on a preliminary point of law, that the Admiralty Court had no jurisdiction to try the action, this objection being based on the rule in *British South Africa Co. v. Companhia de Moçambique* [1893] A. C. 602, where the House of Lords decided that the High Court had no jurisdiction to entertain an action for trespass to land situated abroad. In *The Tollen* Bucknill J. held that the Court had jurisdiction, basing his judgment principally upon the unqualified words defining Admiralty jurisdiction in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 22 (1) (a) (iv), read with sect. 33 (2) of the Act, as covering any claim, whether *in personam* or *in rem*, for damage done by a ship.

The judgment of Bucknill J. was upheld by the Court of Appeal. In his judgment, in which is to be found an exhaustive review of the history of Admiralty jurisdiction, Scott L.J. held the *Moçambique* rule to be inapplicable to such jurisdiction, even apart from the maritime lien to which the damage gives rise. The learned Lord Justice cited numerous authorities, including the old Laws of Oléron and the various International Maritime Conventions. Though it was only necessary for the decision to hold that the Court could exercise jurisdiction *in rem*, it appears from the judgment of Somervell L.J. that, in view of the wide terms of sect. 33 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, it could also exercise jurisdiction *in personam* where necessary. Cohen L.J. held that the *Moçambique* rule was based on two alternative grounds: (1) that the Court will not make an order which it cannot make effective and (2) that the comity of nations requires that English Courts shall not adjudicate in cases where the title to foreign land might be in issue. Neither rule was applicable here since the order could be made effective against the ship and the comity of nations, indeed, required that the Admiralty Court should recognize and enforce a maritime lien in favour of an owner of land situated abroad.

This case is important both in law and in commerce. For the lawyers, it makes clear the nature and extent of Admiralty jurisdiction, on which subject the judgment of Scott L.J. will long be a rich source of reference. For the commercial world, it emphasizes the liabilities of shipowners for damage done by their ships to immovable property outside England, and assimilates such liabilities to those for damage by ships to persons, movable property and other ships, outside England, and Scott L.J. forcibly points out the necessity for such assimilation.

S. L. N.

CONFLICT OF LAWS—FORMALITIES OF MARRIAGE—COMMON LAW MARRIAGE IN
CHINA.

Wolfenden v. Wolfenden. [1946] P. 61.

At a Church of Scotland Mission in China X and Y went through a marriage ceremony conducted by a minister who was neither episcopally ordained nor an

officer able to perform a marriage under the Foreign Marriages Act, 1892. None of the usual formalities were observed.

In response to a petition for a declaration of nullity the marriage was held valid. Since the ceremony did not conform with the Foreign Marriages Act, 1892, and Chinese law was inapplicable, the case turned on whether the marriage was valid at Common Law. The principle that a Common Law marriage can be solemnized only by an episcopally ordained priest (*R. v. Millis* (1844) 10 Cl. & Fin. 534) is qualified in regard to Common Law marriages celebrated abroad by the rule that 'although colonists take the law of England with them to their new home, they only take so much of it as is applicable to their situation and condition' (Sir Erskine Perry C.J. in the Supreme Court of Judicature, Bombay, in *Maclean v. Cristall* (1849) 7 Notes of Cases Supp. p. xvii at p. xxv). In this respect, Lord Merriman P. saw no distinction between British subjects in a colony and British subjects in a Chinese province, despite the fact that English law was administered in the province by Order in Council, 1925. In the circumstances and on the authority of *Maclean v. Cristall* (1849) (*supra*) and *Catterall v. Catterall* (1847) 1 Rob. Eccl. 580, there was no obligation at Common Law to perform the marriage ceremony in the presence of an episcopally ordained priest.

This case is authority for the proposition that the same rule applies to British subjects marrying in foreign territory where compliance with the local forms is impossible as to British colonists—that only so much of English law applies as is suitable to their condition. *Wolfenden's Case* also confirms the judicial tendency expressed in *Catterall v. Catterall* (*supra*) by Dr. Lushington not to extend the principle of *R. v. Millis* 'one iota further than it went.'

M. H.

CONFLICT OF LAWS—NULLITY OF MARRIAGE—POLYGAMOUS HINDU MARRIAGE—
SUBSEQUENT ENGLISH MARRIAGE—HINDU MARRIAGE RECOGNIZED—ENGLISH
MARRIAGE A NULLITY.

Baindail (otherwise *Lawson*) v. *Baindail*. [1946] P. 122.

The respondent, while domiciled in India, contracted, according to Hindu rites, a valid polygamous Hindu marriage. Later, he went through a form of marriage at a London registry office with the petitioner, an Englishwoman, while his Indian wife was alive. In 1944 the petitioner heard of the previous marriage and petitioned for a decree of nullity. This was an appeal from Barnard J. who had followed his own decision in *Srini Vasan v. Srini Vasan* [1946] P. 67 and had made a decree *nisi* of nullity. The Court of Appeal dismissed the appeal.

Lord Greene M.R. said that the question was whether for the purposes of a decree of nullity the courts should disregard the existence of a subsisting Hindu marriage. In *Hyde v. Hyde* (1866) L. R. 1. P. & D. 130, the question had been whether the courts could grant a decree of dissolution of a polygamous marriage, and in deciding in the negative Lord Penzance had been careful to point out that he was deciding the case with reference to the Matrimonial Causes Act and was not deciding that a polygamous marriage could never be recognized for any purpose in an English court. Lord Greene said that none of the cases dealt with the point at issue, that is, whether a polygamous marriage was a bar to an English marriage, nor did they lay down that a polygamous marriage should be disregarded for all purposes. The respondent by his Hindu marriage acquired the status of a married man under the law of his domicile, but, said Lord Greene (at p. 128), 'it would be wrong to say that for all purposes the law of the domicile is necessarily conclusive as to capacity arising from status,' and the question whether the court would give effect to the status possessed by the respondent could be decided with regard to common sense and

'reasonable policy' (p. 129). On these grounds the court held that they should recognize the Hindu marriage as a bar to a subsequent English marriage and that the appeal should be dismissed. Lord Greene pointed out (at p. 130) that nothing he had said should be taken as having the slightest bearing on the law of bigamy.

This case shows that the courts will recognize polygamous marriages for some purposes, not yet fully specified.

G. T. B. B.

CONFLICT OF LAWS—TORT—LIBEL PUBLISHED IN ENGLAND—PARTIES CZECHOSLOVAK CITIZENS—APPLICATION OF CZECHOSLOVAK LAW NOT REQUIRED BY COMITY OF NATIONS.

Szalatnay-Stacho v. Fink. [1946] 2 All E. R. 231.

The respondent, who was chief military prosecutor of the Czechoslovak Military Court of Appeal, which was established in England under the Allied Forces Act, 1940, forwarded to the Military Office of the President of the Czechoslovakian Republic, then also in England, written statements by Czechoslovak soldiers concerning the activities of the appellant while Czechoslovak diplomatic representative in Cairo. With these statements, he sent a covering letter containing charges of serious criminal offences against the appellant. In an action by the appellant for libel, Henn Collins J. had decided that by the comity of nations he should apply Czechoslovak law. And, as no action would lie under that law for this communication, he had held that it was absolutely privileged. He relied on *Hart v. Gumpach* (1873) L. R. 4 P. C. 439, which indicates that in some circumstances it may be against the public interests of this country to entertain a suit involving an inquiry into reports made by an officer in the service of a foreign State to the government of that State, and that one of those circumstances would be the fact that such a communication would be protected in the foreign State. The Court of Appeal, however, disagreed with the opinion of Henn Collins J. on the question of applying Czechoslovak law. 'We do not think that the principle of the comity of nations compels or entitles the courts of this country to apply Czechoslovak law to acts done here, in proceedings in tort between Czechoslovak citizens . . .,' said Somervell L.J. (at p. 234). *Hart v. Gumpach* was distinguished. There, everything had happened in the country whose law it was suggested might be applied to the documents: here, everything had happened in England. Foreign law is not applicable to a document produced and published in England. The Court of Appeal, therefore, applied English law; and it upheld the decision of Henn Collins J. on the ground of qualified privilege.

The decision of Henn Collins J. may indicate a trend away from a nationalistic approach to tort in English Private International Law. If so, it is a welcome sign. However, the refusal of the Court of Appeal to apply Czechoslovak law is, one feels, based on sound principle. Why should English Courts not apply English law to torts committed in England?

C. B. B.

CONTRACT—ASSIGNABILITY—COVENANT FOR SUPPLY OF WATER—CONTRACT CONTAINED ARBITRATION CLAUSE—HELD: BENEFIT OF AGREEMENT WAS ASSIGNABLE.

Shaylor v. Woolf. [1946] Ch. 320.

W conveyed a piece of land to P for the erection of a bungalow and entered into an agreement to supply P with water from a pump on her own adjoining land. W covenanted, for herself and her successors in title, to maintain the pump in repair

but no mention was made of P's assigns. The agreement contained an arbitration clause. The pump fell into disrepair and W sank a new shaft on her land but did not connect this new supply to the bungalow. P conveyed the bungalow to S, together with the benefit, so far as assignable, of the water supply agreement. S demanded a water supply from W, which W refused. S thereupon brought an action for specific performance of the agreement or damages.

The Court of Appeal, affirming Roxburgh J. held that the benefit of the agreement was assignable and had been assigned. There was nothing in the nature of personal services concerned in it and, on its true construction, it was the intention of the parties that it should be assignable even though there was an express reference to W's assigns and none to P's assigns. The agreement being otherwise assignable the existence of the arbitration clause did not render it unassignable, and that clause followed the assignment of the subject matter. It was clearly contemplated by the Arbitration Act, 1889, s. 4, that an arbitration clause was in its nature assignable, and no general proposition that it was not was to be deduced from the words of Wright J. in *Cottage Club Estates, Ltd. v. Woodside Estates Co. (Amersham), Ltd.* [1928] 2 K. B. 463, 466, where he said, 'The arbitration clause is a personal covenant and cannot be transferred; nor, indeed, was it transferred in any sense in this case.' These words must be taken as dealing with the facts of that case. (Morton L.J. at p. 323.)

In the court below ([1946] 1 All E. R. 464) Roxburgh J. had held that both the covenant to supply water and the covenant to keep the pump in repair ran with the land under the Law of Property Act, 1925, s. 78. The Court of Appeal, holding that the covenant had been expressly assigned, did not deal with this question.

A. L. F.

CONTRACT—GUARANTEE OF VOID CONTRACT OF PRINCIPAL DEBTOR—GUARANTEE OF INFANT'S OVERDRAFT AT BANK HELD VOID.

Coutts & Co. v. Browne-Lecky. [1946] 2 All E. R. 207.

Action by Coutts Bank to recover from two joint guarantors the amount of the overdraft of Browne-Lecky, an infant. *Held*, the guarantors of an infant's overdraft at a Bank, where all the parties know the facts, cannot be made liable to the Bank. Oliver J., in his judgment, said that he could not see how a contract to make good an alleged debt of another could be binding where, by the Infants Relief Act, 1874, the loan guaranteed is in terms made absolutely void, for in such a case the omission by the infant to pay that which is void, could be described neither as a debt, a default nor a miscarriage. He applied *Swan v. Bank of Scotland* (1836) 10 Bli. N. S. 627, and noticed that Lord Brougham based that decision, not upon the illegality of the transaction, but upon the fact that the statute had made it void in terms. He also distinguished *Wauthier v. Wilson* (1911) 27 T. L. R. 582, on the grounds that in that case the Court of Appeal's judgment was based on the fact that the transaction was in fact a contract of indemnity, and not a guarantee, and that the father in that case was liable upon his promissory note, independently of a guarantee.

J. P. M. W.

CRIMINAL LAW—QUASI-CRIME—MENS REA—INTENT TO DECEIVE—IGNORANCE OF THE LAW.

Brend v. Wood. (1946) 62 T. L. R. 462 (Divisional Court).

Lord Goddard C.J.: 'It should first be observed that at common law there must always be *mens rea* to constitute a crime; if a person can show that he acted without *mens rea* that is a defence to a criminal prosecution. There are statutes and regu-

lations in which Parliament has seen fit to create offences and make people responsible before criminal Courts although there is an absence of *mens rea*, but it is certainly not the Court's duty to be acute to find that *mens rea* is not a constituent part of a crime. It is of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind. . . . I should be sorry to think that, in any case where the essence of the offence is an intent to deceive, if the man charged proves that he acted in good faith and was innocent of intent to deceive, the Court would hold that he should nevertheless be convicted of intent to deceive.' Humphreys J.: 'I agree with every word of the judgment of my Lord.' Singleton J.: 'I agree.'

It is very refreshing to get such a simple statement of the true position of Quasi-Crime in English law.

Accused was charged under Regulation 82 (1) of the Defence (General) Regulations, 1939. 'If, with intent to deceive, any person . . . has in his possession any document so closely resembling a document issued under the Regulations as to be calculated to deceive,' he commits an offence. The prosecution proved that accused had acquired a petrol coupon in a manner not permitted by law. The Divisional Court interpreted the words in *R. v. Greenberg* (1942) 28 C. A. R. 160, 'provided the Crown can establish an intent to deceive by means of dealings in respect of or in relation to such a document,' to mean that, when the prosecution proved this, it only established a *prima facie* case that the defendant had intent to deceive; which case the defendant must answer if he can. It does not mean that the Court must convict of intent to deceive. Here, the defendant proved (1) that he had received the petrol coupon innocently, and had not known that it was forged, and (2) that he was ignorant of the law relating to fuel coupons, and did not know that he was committing an offence by acquiring a coupon in that manner. *Held*, that the charge was rightly dismissed.

A somewhat similar Police Court case is reported in 11 Journal of Criminal Law, 8; with pertinent and approving remarks by the editor.

H. B.

CRIMINAL LAW—LARCENY—ASPORTATION—EMPLOYEE OF OWNER OF GOODS DISCLOSED TO EMPLOYER THAT A THIRD PARTY HAD ASKED HIM TO STEAL THE EMPLOYER'S GOODS AND HAND THEM TO THIRD PARTY—EMPLOYER INSTRUCTED EMPLOYEE TO HAND OVER GOODS FOR PURPOSE OF APPREHENSION OF THIRD PARTY—HELD: NO ASPORTATION BY THIRD PARTY.

R. v. Turvey. [1946] 2 All E. R. 60.

T, an official in the Ministry of Works, conceived a plan to steal some knives and spoons belonging to the Ministry, and to pass them on to a man who was willing to receive them. He approached another official, W, to induce W to appropriate the property for him. W, however, at once communicated with his superiors and they directed him to hand over the property in order that they might trap T and prosecute him for larceny. This was duly done, and T was convicted and sentenced. He appealed, and the Court of Criminal Appeal quashed the conviction.

Lord Goddard C.J., delivering judgment, pointed out that the owner handed over the goods to T with full intention that he should have them. T, therefore, did not carry away the goods against the will of the owner, but with his complete consent. Lord Goddard distinguished the case of *R. v. Egginton* (1801) 2 Bos. and P. 508, on which the trial Court had largely based its conviction. In that case

a servant revealed to his master that someone was intending to rob the premises, and the master told him to allow him to do so and to catch him in the act. The crime was still committed despite the fact that the owner knew of it in advance but did nothing to prevent it. Hence 'in this case, if W had been told by the person who really had control of these matters, "Let T come in and take the goods," that would have been one thing; but he told him to take the goods and hand them to the appellant, and that makes all the difference' (p. 61). As there was therefore no evidence of asportation, T's conviction for larceny could not stand.

This case serves to reiterate the doctrine laid down in *R. v. Lawrence* (1850) 14 J. P. 561, that there can be no larceny where the servant, acting on the instructions of his master, gives the goods to the thief. The case is notable, therefore, not because it constitutes any innovation, but rather because it provides an interesting illustration of a basic rule of larceny.

J. C. H.

CRIMINAL LAW—MURDER—PROVOCATION—WIFE'S CONFESSION OF ADULTERY IS NOT SUFFICIENT PROVOCATION TO REDUCE KILLING FROM MURDER TO MANSLAUGHTER—FUNCTIONS OF JUDGE AND JURY.

Holmes v. Director of Public Prosecutions. [1946] A. C. 588.

Appeal from a decision of the Court of Criminal Appeal, dismissing an appeal against a conviction of murder at a trial before Charles J.

The appellant killed his wife after a quarrel over her conduct with other men which culminated in her saying: 'I have been untrue to you. . . . I know I have done wrong but I have no proof that you haven't at Mrs. X's.' The appellant then lost his temper, struck her on the head with a hammer-head, and strangled her with the intention, as he admitted, of killing her. The question of law raised in the House of Lords was whether Charles J. was right in directing the jury that upon the evidence it was not open to them to find a verdict of manslaughter, and that the wife's admission of unfaithfulness was not such provocation as could justify a verdict of manslaughter. The House of Lords, dismissing the appeal, held that the direction by Charles J. was correct and a sudden confession of adultery without more can never constitute provocation of a sort which might reduce murder to manslaughter.

Viscount Simon (with whose judgment the other Lords concurred) said the *dictum* attributed to Blackburn J. in *R. v. Rothwell* (1871) 12 Cox C. C. 145, and any cases which seem to accept or apply it, could no longer be regarded as good law. In no case could words alone, save in circumstances of a most extreme and exceptional character, reduce an offence which would otherwise be murder to manslaughter. Viscount Simon emphasized the distinction between what the judge lays down as a matter of law and what the jury decides as a matter of fact. It is for the judge to rule whether the evidence could support the view that the provocation was sufficient to lead a reasonable man to do what the accused did, and if the judge's ruling is in the affirmative, it is for the jury to decide whether, on the evidence, the provocation was, in fact, enough to lead a reasonable person to do what the accused did, and if so, whether the accused did act under the stress of such provocation.

This case does not exclude the possibility that in certain circumstances the use of words without actual violence would justify the reduction of murder to manslaughter.

R. M. O. H.

LANDLORD AND TENANT—LANDLORD'S IMPLIED OBLIGATION TO KEEP HOUSE FIT FOR HABITATION—NOTICE BY TENANT REQUIRED—HOUSING ACT, 1936, s. 2.

McCarrick v. Liverpool Corporation. [1946] 2 All E. R. 646.

Appellant's wife was injured owing to the state of disrepair of the dwelling-house leased to him by the respondent. The premises fell within the Housing Act, 1936, s. 2, requiring the landlord to keep them 'in all respects reasonably fit for human habitation.' Appellant sought to recover the special damages thereby suffered.

The House of Lords, affirming the Court of Appeal, dismissed the appeal, holding that the provision imported by the Housing Act, 1936, s. 2, into the contractual tenancy must be construed in the same way as any other term in the lease. The landlord's duty to keep the premises fit for human habitation was held not to arise unless he had notice of the defect rendering the premises unfit.

Their Lordships based their decision on *Morgan v. Liverpool Corporation* [1927] 2 K. B. 131, where the Court of Appeal had held in a similar case that the landlord's liability was conditional upon the receipt of notice from the tenant. The Housing Act, 1936, s. 2, grants the landlord a right of entry to examine the state of the premises, and the appellant, relying on *Murphy v. Hurly* [1922] 1 A. C. 369, contended that the landlord was therefore under a duty to repair irrespective of notice. Their Lordships rejected this view on the ground that although the landlord had a right of entry, the tenant had exclusive possession of the property and was consequently particularly well placed to have knowledge of any defect in the premises. The landlord's liability to keep in repair must be interpreted as though it formed part of the lease itself, so that it became analogous to a normal covenant to repair. The tenant was entitled to remain silent unless he wished to enforce the duty laid on the landlord by the Housing Act.

The House of Lords unanimously expressed the view that the effect of the Act was to include in the tenancy agreement a contractual obligation binding the landlord to the tenant, and not to subject the landlord to a statutory duty of performance. As an implied term, it must be construed within the framework of the contract between the parties, and in such a way as to give it business efficacy. This could be achieved only if the landlord's obligation was conditional upon the receipt of notice.

It is to be noted that Lord Uthwatt expressly reserved his opinion on the question of latent defects, as the state of disrepair in question was of an obvious nature and one of which the tenant had full knowledge.

F. E. Z.

LANDLORD AND TENANT—NATURE OF TENANCY CREATED—PERPETUALLY RENEWABLE LEASE—DEMISE FOR TWO THOUSAND YEARS—LAW OF PROPERTY ACT, 1922, SCHED. XV, PARA. 7 (1)—LAW OF PROPERTY ACT, 1925, SECT. 149 (3).

Northchurch Estates, Ltd. v. Daniels. [1946] 2 All E. R. 524.

This was a summons under R. S. C. Ord. 54A for the determination of questions arising out of a tenancy agreement. The agreement was made in 1938 between M, the landlord, and R, the tenant, for the lease of premises. At a later date the interest of M became vested in the plaintiffs, and the interest of R became vested in the defendant. The agreement was, for the most part, a printed document and the vital clause, whose construction fell to be determined, ran as follows: 'The term shall be for a period of one year certain from March 25th, 1938, the tenant having the option to renew the tenancy from year to year on identical terms and

conditions as hereinafter stated: notice of such intention to renew the tenancy to be given in writing on or before December 25th in each year.' There were other terms in the agreement which might appear inconsistent with an intention to create a perpetually renewable leasehold.

Evershed J., giving judgment, said that although it had been the practice of the Court to lean against construing agreements as perpetually renewable leaseholds, and although some of the covenants in the agreement might appear inconsistent with such a construction, nevertheless the language used by the parties 'admits of no reasonable doubt that they intended to create what is called a perpetually renewable leasehold' (at p. 526). This, under the Law of Property Act, 1922, Sched. XV, para. 7, would take effect as a demise for two thousand years. Counsel for the plaintiffs put forward the further argument that, adopting the language of Warrington J. in *Gray v. Sayer* [1922] 2 Ch. 22, the agreement might be regarded as a contract to create a succession of reversionary terms, and would thus be caught by sect. 149 (3) of the Law of Property Act of 1925 and rendered void. Evershed J. rejected this argument on the ground that even though there appeared to be a conflict between sect. 149 (3) of the Act of 1925, and Sched. XV to the Act of 1922, the whole of the property legislation must be construed together, and 'reading the two Acts together, the case of a perpetually renewable leasehold, though there may be some variation in its form, *prima facie*, at any rate, is not comprehended by sect. 149 of the Act of 1925' (p. 528). An apparent conflict between the provisions of closely connected statutes was thus reconciled.

A. C. T.

TORT—ABSENCE OF NEGLIGENCE—STRICT LIABILITY UNDER RULE IN *RYLANDS V. FLETCHER*—ELEMENT OF 'ESCAPE' ESSENTIAL.

Read v. J. Lyons & Co., Ltd. [1946] 2 All E. R. 471.

The appellants, Mrs. R., who did not undertake the work voluntarily, was employed by the Ministry of Supply as an inspector at a munitions factory controlled by the respondents. While she was in the filling-shop, a shell exploded and injured her.

In an action for damages, no negligence was averred or proved against the respondents, but Cassels J. gave judgment for the appellants on two grounds: (1) the respondents were carrying on an ultra-hazardous activity and were therefore under a 'strict liability' to the appellants whether on or off the premises; (2) the plea of *volenti non fit injuria* must fail owing to the compulsory nature of her employment.

The Court of Appeal reversed this decision, holding that there was no general principle of English law which rendered a person carrying on a dangerous activity liable to anyone thereby injured merely because the activity was dangerous; that the doctrine in *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330 had no application to an accident incidental to the process of manufacture occurring to a person lawfully on the premises; that there must be an escape of the damage-causing thing from the premises and damage caused outside them before the doctrine could apply; and that the respondents, not being guilty of negligence, were not liable.

Before the House of Lords the respondents withdrew the plea of *volenti non fit injuria*, relying solely on the defence that no cause of action lay. Their Lordships affirmed the decision of the Court of Appeal. They held: (i) that the fact that the work done in the factory required a high standard of care did not make the occupier liable for resulting damage to the appellants (who was in the position of an invitee) without proof of negligence; and (ii) that in respect of the thing causing damage there was no 'escape' here of the relevant kind, and therefore the doctrine in *Rylands v. Fletcher* could not operate. Lord Macmillan expressed the opinion

that, in any case, the rule in *Rylands v. Fletcher* would not extend to an action for personal injuries as distinct from damage to property.

This case suggests a present tendency not to extend the principle in *Rylands v. Fletcher* beyond the strict limits laid down by the House of Lords in 1868. Lord Simon made it clear (p. 474) that he opposed any such extension.

A. C. H. B.

TORT—ANIMALS—HORSE STRAYING TO HIGHWAY—NO DUTY ON OWNER TO MAINTAIN FENCE.

Searle v. Wallbank. [1947] 1 All E. R. 12.

The appellant, cycling on the highway in the black-out, collided with the respondent's horse and was injured. The horse (not normally a mischievous animal) had escaped from the respondent's field, which abutted the highway, owing to the defective state of the hedge. The Court of Appeal affirmed the decision of the County Court judge and dismissed the appeal, but, in view of the criticisms of the law in *Hughes v. Williams* [1943] 1 K. B. 574, leave was given to appeal to the House of Lords. The House of Lords held that the respondent was not liable. It was argued that, although the owner of land adjoining the highway is not under any duty to fence his land, yet, if he keeps cattle on his land behind an apparently secure fence, he must see that it is, in fact, secure. This contention was rejected, and it was held unanimously that the owner of land adjoining the highway is under no duty to users of the highway to maintain his fences so as to prevent his animals (not normally dangerous) from straying on to the highway.

The further argument that, quite apart from any knowledge of his animal's vicious propensities, the owner of an animal (not normally dangerous) was under a duty, as between himself and users of the highway, to take reasonable care to prevent it from straying on to the highway, was also rejected.

Both the history of our highways and the previous decisions were contrary to the existence of any such duties, and their Lordships saw no reason for imposing on owners of animals 'an onerous and undefined duty to cyclists and motorists and others which never previously existed' (per Viscount Maugham, at p. 17). As regards the question of whether the horse constituted a nuisance, a straying horse was not *ipso facto* a nuisance any more than was a temporarily broken-down lorry (Lord du Parc, at p. 22), and the same considerations which guided the Court of Appeal in *Maitland v. Raisbeck* [1944] 1 K. B. 689 were applicable in this case. The principle of which the Court of Appeal so strongly disapproved in *Hughes v. Williams* [1943] 1 K. B. 574, has thus been unequivocally confirmed. It may be suggested, however, that any other conclusion would have resulted in great difficulties in defining the scope of the duty and would have placed a heavy burden on owners of animals.

P. R. O.

TORT—CROWN PROCEEDINGS—NOMINAL DEFENDANT—COURT HAS NO JURISDICTION TO HEAR ACTION.

Royster v. Cavey. [1946] 2 All E. R. 642.

The plaintiff, an employee at a factory owned by the Ministry of Supply, sustained personal injuries by falling into an open trench, while walking, before daylight, along the road which led from the factory entrance to her place of work. In the ensuing action she alleged breach of the Common Law duty of an occupier to keep his premises in a safe condition, and, alternatively, breach of a statutory duty,

imposed by the Factories Act, 1937, to provide safe access to every place of work. In the County Court the facts were held insufficient to establish either claim, and the case was dismissed. The plaintiff appealed. The Court of Appeal dismissed the appeal.

Scott L.J. pointed out that the Ministry of Supply, being in effect the Crown, could not appear as defendant: following normal procedure, a person had been named, against whom the plaintiff could bring her action. Since that step had been taken, the House of Lords, in *Adams v. Naylor* [1946] A. C. 543, had, in emphatic *obiter dicta*, reviewed and severely restricted the legality of this practice. A plaintiff could succeed only if he proved personal liability on the part of the defendant, and the fact that the Crown stood behind the latter was irrelevant. 'The matter could not be dealt with on the basis wished by the Crown' (Lord Uthwatt, in *Adams v. Naylor*)—in this case, on the basis that the defendant was occupier of the factory premises. Although the defendant had not denied this assertion, it was in fact untrue. He was merely 'superintendent' of the factory, and, as counsel for the plaintiff freely admitted, a 'nominal defendant,' who therefore could not owe the duties for breach of which the action was brought.

On these grounds the Court declined to hear the action. A request for adjournment was also refused, for, whatever statutory provision might be made for such cases in the future, this action against this particular defendant could never succeed. Leave to appeal to the House of Lords was, however, granted.

This decision provides a striking application of the principle laid down in *Adams v. Naylor*: it emphasizes the urgent need for statutory intervention to end or modify the Crown's immunity in Tort. The authoritative rejection of a convenient but undoubted fiction—the nominal defendant—has forced this historical anomaly more clearly into the light of day.

J. A. R.

TORT—MASTER AND SERVANT—CRANE WITH DRIVER LET BY PORT AUTHORITY TO STEVEDORES—ACCIDENT CAUSED BY NEGLIGENT DRIVING OF DRIVER—LIABILITY OF GENERAL EMPLOYER.

Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool), Ltd. and McFarlane. [1946] 2 All E. R. 345.

The Board let out a mobile crane, driven by a skilled workman, engaged and paid by them, to a company of stevedores, who were unloading cargo at the docks. The conditions of hire provided, *inter alia*, that the Board would provide drivers for the cranes let out, but these drivers were to be servants of the applicants. The plaintiff, McFarlane, was checking some goods being transferred by crane, when he was injured as a result of the negligent driving of the crane. He sued the Board and the company and was awarded damages against the former. This decision was affirmed by the Court of Appeal. The Board now appealed. McFarlane was added as respondent by direction of the House of Lords.

The House of Lords unanimously dismissed the appeal. The Court held that in order to apply the maxim *respondeat superior*, it must be decided whether McFarlane was the servant of the Board or of the company. The Board were general employers and therefore liable unless they could shift the *prima facie* responsibility to the hirers. This would only be possible in exceptional circumstances. For the hirers to assume liability, they must have the authority not only to control the employee's work but also to control his method of performing it. The Board were unable to discharge this burden of proof. The condition of hire on which the Board relied did not help them. Although it might alter, *inter se*, the liability of the general and special employers, it would not alter the Board's liability to McFarlane. He still remained

their servant, for servants cannot be transferred from one service to another without their consent. (Such a term might, however, be evidence as to where the authority to control the servant lay.) If, however, the employee's tortious act were done by direct command of the special employer, such an employer might be sued as joint tortfeasor with the workman.

In any case of this sort, the question of liability is decided entirely by the circumstances. The best test to determine this liability seems that recommended by Lord Uthwatt (at p. 355): 'Whether or not the hirer had authority to control the manner of execution of the act in question. Given the existence of that authority, its exercise or non-exercise on the occasion of doing the act is irrelevant. The hirer is liable for the wrongful act whether he gave any specific order or not.'

R. P. E. C.

TORT—NEGLIGENCE—SUBMARINE SUNK AT TRIALS WITH LOSS OF LIFE—TORPEDO TUBE TEST-COCK BLOCKED WITH PAINT—CLAIM FOR DAMAGES—RES IPSA LOQUITUR REBUTTED—CARELESSNESS RE TEST-COCK BUT NO 'DUTY.'

Woods v. Duncan, Duncan v. Hambrook, Duncan v. Cammell Laird & Co., Ltd.
[1946] A. C. 401.

C L (Cammell Laird & Co.) were employed by the Admiralty to build a submarine. C L employed the B Co. to do certain painting. Servants of the B Co. obstructed a test-cock of a torpedo tube with bitumastic enamel. During the trials at sea Lieut. W, relying on this test-cock and certain instruments, believed the bow-cap of the torpedo tube to be closed, and opened the rear-door. The bow door was in fact open and an inrush of water caused the submarine's loss. D and C, who were on board, lost their lives. Their widows sued Lieut. W, C L and B Co. for negligence. The House of Lords held: (1) reversing the Court of Appeal, that Lieut. W was not liable, (2) affirming the Court of Appeal that C L, B Co. were not liable. As to (1), it was held that negligence had not been established. Although *res ipsa loquitur* applied, it merely shifted the burden of proof. Lieut. W had satisfied the Court that he had taken reasonable care to prevent such an accident. He did not have to 'prove how and why the accident happened.' (Lord Simonds at p. 439.) As to (2), although there was carelessness on the part of both defendants, the deaths of those on board were caused by a chain of events which the defendants could not reasonably have foreseen so as to create a legal duty to the deceased. Unless the defendants should have reasonably foreseen 'the intervening act, the opening of the rear door with the bow door open' (Lord Simonds, p. 443) D and C were not their 'neighbours' within Lord Atkin's definition of duty in *Donoghue v. Stevenson* [1932] A. C. 562, 580.

Causation in negligence cases is usually associated with remoteness of damage, but this decision indicates that it is also relevant in determining whether the 'duty' to take care has been established. It may be suggested that the defendants might have been able to foresee some damage from their careless act. However, the Court held that they could not possibly have foreseen damage resulting from this particular course of events and therefore they owed no 'duty.' As there was no 'duty' no question of remoteness of damage could arise.

F. E. K.

TORT—TRESPASS TO LAND—ORAL TENANCY AGREEMENT—CLANDESTINE ENTRY INTO POSSESSION BY TENANT—FORCIBLE EVICTION BY OWNER—TENANT'S RIGHT TO SUE FOR DAMAGES—LAW OF PROPERTY ACT, 1925 (15 GEO. 5, c. 20), s. 40.

Delaney v. T. P. Smith, Ltd. [1946] K. B. 393.

The defendants were owners of a dwelling-house and orally agreed to let it to the plaintiff after the completion of certain repairs. Subsequently they changed their minds and decided to sell the house. On learning of this, the plaintiff made a clandestine entry into possession and was forcibly ejected by the defendants a week afterwards. He sued the defendants for trespass.

In a reserved judgment, the County Court judge awarded damages to the plaintiff, although he found that there had been no memorandum in writing of the tenancy agreement so required by sect. 40 of the Law of Property Act, 1925; nor had there been an act of part performance. But he held that the plaintiff relied on the agreement only as a reply to the defendants' plea that the trespass was justified, and not as a cause of action.

The Court of Appeal unanimously reversed this decision, holding that the plaintiff had to rely on the agreement as an essential part of his cause of action. The plaintiff need only allege possession of the land in an action for trespass against a wrongdoer, but when suing the lawful owner, a higher burden of proof is required from him, since he must at some stage of the proceedings set up the title derived from the defendant. The truth of this can be tested by a reference to the strict pleadings in force before the Common Law Procedure Act of 1852, and it still holds good to-day. In the present case, the plaintiff could succeed only by strict proof of a demise from the defendant to the plaintiff which complied with the law. To do this, he must have complied with sect. 40 of the Law of Property Act, 1925, or there must have been a sufficient act of part performance, for he was in effect bringing an action on a contract relating to land. Since it had been found that there was neither writing nor part performance, he could not rely on the agreement to set up a title against the owner, and his action for trespass must fail.

The principle of the decision is analogous to the well-known rule that an unenforceable contract made with an infant cannot be indirectly enforced by suing in tort instead of in contract.

Presumably the principle would equally apply to a trespass to goods, for instance, under sect. 4 of the Sale of Goods Act, 1893, in cases where the property in the goods has not already passed to the buyer by virtue of the sale.

M. R. E. K.

WILL—PLACE OF TESTATOR'S SIGNATURE—TESTATOR'S INTENTION—WILLS ACT, 1837, s. 9—WILLS ACT AMENDMENT ACT, 1852, s. 1.

In the goods of Hornby. [1946] P. 171.

A testator wrote his will on one side of a sheet of paper in green ink; on the right-hand side, about a third of the way down, he drew an oblong space in which he wrote the word 'Signed' and in this oblong space, but in a different coloured ink, he signed his name. The signatures of the attesting witnesses, also in the different coloured ink, appeared at the foot of the page. There was no evidence other than the document itself.

Held, that the position of the signature satisfied sect. 1 of the Wills Act Amendment Act, 1852, and that the will was admissible to probate.

Sect. 9 of the Wills Act, 1837, requires a will to be signed 'at the foot or end thereof.' Sect. 1 of the Wills Act Amendment Act, 1852, amplifies this by permitting

signatures 'at or after, or following, or under, or beside, or opposite to the end of the will' provided 'that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will.'

Wallington J. held that it is for the Court to decide (1) what in each particular case is the 'end of the will' and (2) whether the document, as signed, does make manifest the intention of the testator to give effect to the whole will. The learned judge held that the signature, in the middle of the page as regards space and position, was, as a matter of law, 'at the end' of the will as regards time and intention. Having come to this conclusion the learned judge felt relieved of the necessity to apply a further sentence of sect. 1 of the 1852 Amendment Act, which reads, 'no signature . . . shall be operative to give effect to any disposition or direction which is underneath or which follows it.' Lord Hanworth M.R. in *Re Stalman* (1931) 145 L. T. 339, 340, said this sentence amounted to 'an express prohibition that words following a signature cannot be operative.' By Wallington J's interpretation, such words *can* be operative, provided it is manifest that when the testator signed the will, he intended to approve the whole document including dispositions underneath the signature.

S. W. T.

BOOK REVIEWS

Comparative Law. An Introduction to the Comparative Method of Legal Study and Research. By H. C. GUTTERIDGE, K.C., LL.D. (*Cambridge Studies in International and Comparative Law*, Vol. I.) London: Cambridge University Press. 1946. xvi and 208 pp. (12s. 6d.)

It is a happy coincidence that the new Cambridge Series on International and Comparative Law is opened by a book from the Emeritus Professor of Comparative Law in the University of Cambridge. A master both in the common and in modern civil law, he has been able to explain each system in terms of the other, to assess their advantages and shortcomings and to take a lead in Law Reform. His practical experience as British delegate at international conferences has given him an unrivalled perception of the needs for unification in certain branches of law. But the purpose of this book is not to promote Law Reform or Unification. It is a study in legal method which relies on previous works on the history of comparative legal studies and on systematical or analytical surveys of the world's legal systems. In the first chapter the various meanings which have been attributed to the term Comparative Law are discussed briefly and the conclusion is reached that it denotes a method rather than a special branch of law. This is followed by a short sketch of its historical development which achieves a remarkable completeness within limited space. It is to be hoped that in times to come the works of the authors who are listed in this section will be made the subject of detailed studies regarding the sources upon which they relied and the influence which they exercised. The chapter entitled 'The Value of Comparative Law' constitutes one of the main parts of the book. Here the application of the new method is examined in relation to different branches of law, such as legal history, constitutional and administrative law, criminal, industrial and labour law, family law and the law of succession, the law of obligations, commercial law and procedure. The scope of the work made it necessary to restrict a discussion of each of these aspects, but perhaps somewhat greater emphasis could have been put upon legal history and procedure as objects of comparative study. Similarly, in the law of procedure, not only have municipal systems been fertilized by ideas taken from abroad, but the procedure of international tribunals has often been decisively influenced by municipal laws of procedure.

The chapters on the relation between comparative law and the conflict of laws on the one hand and international law on the other are authoritative pronouncements which should be studied by every student of these subjects. Here, as elsewhere in the book, the author accepts a cautious attitude and emphasizes that it is the task of comparative law to prevent municipal and international courts either from importing their own notions into other systems and into international law and from falling a prey to misleading statements on foreign law. The process of comparison is examined and this leads to a discussion of the technical aspects of Codes, of statute and case law, and of the materials for comparison. Professor Gutteridge observes rightly that Codes are not exhaustive, that gaps must be filled and that the judge 'must seek elsewhere for a rule of law to be applied in the matter.' It is difficult to state, however, whether the courts have consciously followed an interpretation according to the '*but social*' in the sense advocated by Gény. On p. 92 the functions of the *sections réunies* of the French Court of cassation and the *Plenum* of the German *Reichsgericht* are not quite clearly distinguished. After a discussion of the problem of legal terminology and of the role of comparative law in legal education the author devotes the last three chapters to the movement for the unification of private law and to the methods which have been employed to achieve it. The treatment is

masterly, and Professor Gutteridge deserves the gratitude of all who are interested in this branch of human activities for having made available to them the fruits of his unique learning and experience. Indeed, unique learning and experience characterize the book as a whole.

K. L.

The Rent Acts. Second Edition. By R. E. MEGARRY, M.A., LL.B., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1946. Part I—Text xvi and 78 pp. Index 6 pp. (7s. 6d. net.) Part II—Statutes. 210 pp. (5s. net.) Parts I and II together. (10s. 6d. net.)

This is much more than a new edition of the author's admirable *Introduction to the Rent Acts*, which was published in 1939. The work has been practically re-written, the first part has an additional twenty pages, and the second part, dealing with the Acts from 1915 to 1946 and their Rules and Orders, is quite new. To Mr. Megarry, 'the chaotic verbiage' of the Rent Acts has a real 'fascination,' his work is a clear and penetrating analysis and produces order out of the chaos. His arrangement is excellent and makes for ease of reference in solving problems that constantly arise. He deals with the 'difficult and embarrassing Acts' under main chapter headings, Premises within the Acts, Benefits conferred upon tenants by the Acts; Miscellaneous Provisions and Mortgages, all of which are subdivided in such a way as to lead to the point one requires. Infinite care has been taken in selecting authorities. English, Irish and Scottish cases are quoted, and many from the *Estates Gazette Digests*, and some are County Court decisions. We agree with him that a considered judgment on an unsettled point properly argued is very much better than nothing at all. Nothing has been spared in bringing the book up to date (see p. 209). Mr. Megarry is a master of this subject and has succeeded pre-eminently in achieving 'substantial comprehensiveness, both in the law and in its application to a diversity of facts.' Practitioners and others owe a deep debt of gratitude to the author and look forward to the third edition.

T. E. L.

Constitutional Law. Third Edition. By E. C. S. WADE, M.A., LL.D., of the Inner Temple, Barrister-at-Law, Downing Professor of Laws in the University of Cambridge, and G. GODFREY PHILLIPS, C.B.E., M.A., LL.M. London: Longmans, Green & Co. 1946. 474 and xxv pp. (25s.)

The merits of this book are already well known. They are clear and accurate exposition, comprehensiveness within the limits set, and well-informed objective criticism. Considerations of space forbid fuller treatment of such topics as trade unions, treason and sedition, Colonies and Dominions, and may render some passages rather too concise for beginners. The most serious limitation is the virtual exclusion of those historical explanations without which many of our laws and institutions are difficult to understand.

The third edition, which was largely re-written by one of the learned authors before the end of the war in Europe was in sight, maintains the high standard of its predecessors. The main changes are in Part II on general principles, Part VII on the constitutional aspects of Administrative Law (*sic*), and Part X on the Dominions. The reduction by about eighty pages seems to be due to closer print. The revisions, by way of explanation, example and set-out, should clarify matters for the student. The bringing of the materials up to date (to the early part of 1945), which has been done with the efficiency one would expect, may be illustrated by the chapter on

India. It was, of course, too early to discuss the permanent effects of the war on the Constitution, and we are necessarily denied for the present that account of the working of the cabinet system in wartime which Professor Wade would be peculiarly well qualified to give.

The alterations in arrangement are for the better. We may notice in particular that the chapter on governmental powers, formerly in Part II, has been brought into Part VII, which many will find the most valuable portion of the book. It is not easy, however, to see the basis on which chapter 2 (The Courts and Public Authorities) is separated from it after 4 (Judicial Control of Powers). In Part VIII (The Citizen and the State) there is a new chapter on emergency powers in peace and war, though no reference is here made to common law powers. Part X (The British Empire and Commonwealth) might well change places with Part XI (Church and State).

We doubt whether the learned authors can be entirely satisfied with Part X. Apart from the interpretation of Dominion constitutions, which is perhaps better left out altogether if it cannot be treated in more detail, there is so much material asking for admittance to the very limited space allowed.

Reviewers also suffer under limitations of space, and we can only indicate a few points on which we should like to join issue with the authors. They might reconsider the classification of the survey of English constitutional law and the examples given (pp. 3—10), with reference to prerogative Orders in Council, *lex et consuetudo Parliamenti*, and the works of such writers as Coke, Hale, Hawkins, Foster and Blackstone. In what senses are we to understand 'source' and 'law' when conventions are said to be a source of law (pp. 3, 7, 57)? A few conventions have been a historical source of statute law. Is the 'principle' of the 'rule of law' (pp. 55—56) legal or political? And what is its relation to the supremacy of Parliament? (In the preface, the three cardinal features of the constitution are given as parliamentary supremacy, ministerial responsibility and judicial independence). With regard to the discussion on why conventions are observed (p. 67), we understand Dr. Jennings's criticism to be directed against a theory of law rather than a theory of conventions (see *The Law and the Constitution*, 3rd ed., App. III). We do not follow the argument that judges are not removable under the provisions of the Parliament Act, 1911 (p. 215), unless the point is that such a Bill would not be a Public Bill; otherwise, the Parliament Act would modify the Act of Settlement.

Misprints are very few and unimportant. Only the rawest apprentice would be misled by a capital letter into thinking that the Courts could hold an Act (*sic*) illegal (p. 324, line 2); and Freudian theory suggests that it is an indignant printer and not Sir Cecil Carr who wishes to ban delegated legislation (p. 424 n.).

O. H. P.

The British Year Book of International Law. Twenty-second Year of Issue. Published under the auspices of the Royal Institute of International Affairs and edited by Professor H. LAUTERPACHT. London: Geoffrey Cumberledge (Oxford University Press.) vi and 341 pp. (27s. 6d. net.)

The latest volume of the *British Year Book* is an admirable one indeed. It opens with an account by Mr. J. Walter Jones of Leibniz as international lawyer in which interesting light is thrown, quite incidentally, on the unfortunate affair of Don Pantaleo de Sá and on the origin of *Rymer*. Next comes a lengthy and most valuable survey of some of the problems which arise in connection with the setting up of international organisations. This is from the authoritative pen of Mr. C. Wilfred Jenks, who has played a notable part in the formulation of the constitutions of other new organisations besides his own I.L.O. and who contributes also to this

volume a note on the juridical personality of such bodies. There is little doubt that this study must for some time remain the starting-point of any academic investigation of the 'specialised agencies.' In the third paper Mr. Fitzmaurice deals with modern contraband control. Particularly striking is his account of the manner in which the 'voluntary' navicert system operated in practice to compel neutral owners to submit to its requirements. One is left with the feeling that the early introduction of the 'compulsory' system as a measure of reprisal during the late war could have done little to tighten the control. Fourthly, Dr. Schwarzenberger contributes a well-documented study of the most-favoured-nation standard in British practice. His most thought-provoking passages are perhaps those in which he deals with the problem as to how far the standard must yield to considerations of public policy, national and international. He concludes that its subscription to the *lex societatis* must preclude any protest by an aggressor against variation of the standard by a State with which it is in commercial treaty relations where such occurs as the result of sanctions undertaken in furtherance of a collective system of which both States are members. Next Mr. Mervyn Jones gives a most valuable account of the condition of British-protected persons. He disposes effectively of the heresy that only British subjects are British nationals, nationality being a term of international and not of municipal law. And he discloses what was new to at least this reviewer—that many persons are simultaneously British subjects and British-protected persons. The borrowing by municipal law of international legal conceptions, if it thus put an end to one source of possible misunderstanding, seems therefore to create another. After Mr. Jones comes Dr. Lipstein, who presents a neat summary of the present situation of the Calvo Clause. Then follows Dr. Glanville Williams, who has extended his researches into the meaning of the word 'law' into the realm of the law of nations. He has thereby provided an introduction to, and in part a summary of, his lengthier contributions to recent issues of the *Law Quarterly Review* which should prove of great assistance to those who find some difficulty in grasping the nature of this intriguing problem. And then Professor Lauterpacht treats of yet another aspect of recognition: this time of *de facto* recognition and its withdrawal. Incidentally the University Press has recently announced the imminent appearance of Professor Lauterpacht's definitive treatise on recognition. Mr. Jennings next compares the Paris and the Chicago conventions on aerial navigation, and Mr. Walker absolves Bynkershoek from the charge of having equated the range of cannon with three miles. And finally Mr. Morris examines the law governing the transfer of title to chattels in the conflict of law. He tabulates a number of valuable conclusions concerning that hitherto obscure topic.

These, then, are the Articles, all of high merit. After them come the Notes. In addition to that by Mr. Jenks to which reference has been made already there are Notes on the Diplomatic Privileges (Extension) Act, 1944, Open Towns, the restoration of Ethiopian sovereignty, and the Matrimonial Causes (War Marriages) Act, 1944. And there is a most useful and illuminating comment on the constitutions of the International Bank and the International Fund by Dr. Mann. The Decisions follow the Notes. This year there is none of public international legal import except in the special field of trading with the enemy, upon which topic Mr. Henriques collects four. But there is a valuable series of conflicts decisions which it is useful to have summarised as it is here. The Reviews follow the Decisions and are themselves entertaining and informative, particularly those by Mr. Mervyn Jones of the *Annual Digest*, and of Dr. Schwarzenberger's new textbook, and by Dr. Lipstein of Professor Martin Wolf's *Private International Law*.

As for the production and arrangement of the volume, it is sufficient to say that it is edited by him who edits also *Oppenheim* and the *Annual Digest and Reports* and who appears again as co-editor of the new and welcome *Cambridge Studies in International and Comparative Law*. Evidence of his skill is abundant. It would

be impertinent to look for the misplaced comma. But may it be respectfully suggested that some common method of describing themselves and, incidentally the authors of the books they review, should be indicated to contributors? At the moment some allow themselves to be Misters, Doctors or Professors whilst others do not; some confess to academic qualifications and others abstain; and one contributor's name appears both at the beginning and the end of his paper.

Odgers' Principles of Pleading and Practice. Thirteenth Edition. By W. BLAKE ODGERS, K.C., M.A., and L. S. SHARPE. London: Stevens & Sons, Ltd. 1946. lxi and 567 pp. (30s.)

This book, which has for the past fifty-five years been the standard introduction to the intricate subject of Pleading and Practice in our courts, is so well known that a reviewer can do little more than note the details that distinguish one edition from another. An important and in our view welcome alteration in this new addition is the re-writing of the first chapter. As the learned editors say in their preface, the old Chapter I may have 'lured the reader into the wood and given him a close-up of the trees in it, without first giving him some idea of the shape of the wood as a whole.' The new chapter clearly defines the scope of the book as dealing with the procedure in an action at law commenced by Writ of Summons in the King's Bench Division and gives an outline of the more important steps in an ordinary King's Bench action. The beginner thus gets a preliminary survey of the whole subject before applying himself to its details. Apart from this chapter the general arrangement of the book remains the same, except that the names of many of the cases previously appearing in the text have now been relegated to footnotes. The text has been carefully and accurately brought up to date, though reference to emergency legislation caused by the war has been left over to the next edition, should such reference then be necessary.

With the present increase of candidates for professional examinations this work appears at an opportune moment, and well maintains the standard of its predecessors in practical value and lucidity.

Cases on the Law of Contract. By G. C. CHESHIRE, D.C.L., F.B.A., Vinerian Professor of English Law, etc., and C. H. S. FIFOOT, M.A., All Souls Reader in English Law, etc. London: Butterworth & Co. 1946. xxiv and 432 pp. (30s.)

The editors in their preface state that the volume is designed primarily to accompany their book on the Law of Contracts, an excellent book already well known to students. They also state that they have deliberately rejected the course of 'extracting fragments from different judgments and offering in predigested form the otherwise raw materials of the law' and have instead elected 'to transcribe chosen judgments in their entirety,' this alternative appearing to them 'at once more scholarly and more practical': for the reason that 'the student if he is to be more than a mere mechanic cannot be introduced too soon to his original sources. By following the judge's mind from the start to the finish of a case he will not only accustom himself to the "flow" of English law, but will learn to search for the *ratio decidendi* and begin to practise the art of distinction.'

It would be imprudent to differ, on a matter of teaching method, from teachers of such great experience as these editors. It should, however, be noted that the arguments of counsel are virtually always omitted, except in a few of the older cases, such as *Planché v. Colburn*, where the pleadings are given. The omission of the

arguments seems seriously to detract from the object of introducing the student to the original source. Moreover, it is rare that more than one judgment is given, even in a House of Lords case, with the consequence that a student may easily be led to believe that the finding of the *ratio decidendi* is a good deal simpler than it is. For example, in *Brogden v. Metropolitan Railway Co.* the most instructive doubts of Lord Blackburn are omitted, and though in the *Tamplin* case both Lord Loreburn and Lord Parker's judgments are given the case still bears an air of deceptive simplicity by the omission of Lord Haldane's dissent.

The editors have added nothing by way of reference either to their own text-book or to periodical literature. Beyond the headnotes, which are very concise, addition is made to the Law Reports text in two places only, *viz.*, at pp. 315 and 423; and the addition is in the form of a quotation from judgment in another case. So that the transcript is indeed a bare one.

The book may be useful to a student who has no access to the Law Reports, though even he may be given a misleading impression of what are the sources of the law.

C. J. H.

Hill and Redman's Law of Landlord and Tenant. Tenth Edition. By W. J. WILLIAMS, B.A., of Lincoln's Inn, Barrister-at-Law, Managing Editor of the *Encyclopædia of Forms of Precedents*, and Miss M. M. WELLS, M.A., of Gray's Inn, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. cexlviii and 1075 pp., and Index 78 pp. (63s. net.)

The general scheme of this standard work of reference follows that of the previous edition of 1939. Part I is a comprehensive survey of the common law governing the relationship of landlord and tenant as modified by a mass of statutes. The effect of the endless output of case-law since 1939 is duly incorporated in the text. The variety of relationships which fall under the head of landlord and tenant and the kindred topics of licences, licences coupled with an interest, lodgers and servants, are examined in detail. Attention is drawn in the preface, pp. v and vi, to the changed nature of the relation of landlord and tenant since the time of its purely contractual origin. The final chapter on the preparation and perusal of draft leases is a welcome addition, in that it emphasizes various points (apt to be overlooked) which arise for consideration in advising an intending lessor and lessee. This main part of the book is the 'core and essence' and takes 610 pp.

Part II covers pp. 612—698 and deals with statutory provisions, text and complete annotations. Among others, the special relationship arising under the Agricultural Holdings Act, 1923, the Agricultural (Miscellaneous War Provisions) Acts, 1940, 1941, 1943, the Landlord and Tenant Act, 1927, the Increase of Rent and Mortgage Restrictions Acts, 1920—1939, the Rent Restriction Regulations, 1940, the Furnished Houses (Rent Control) Act and the Housing Act, 1936 (overcrowding provisions). The introductory note on the Rent Acts at pp. 761—775 is a model of compression and clarity.

Part III is devoted to Emergency Legislation with full annotations. The omission of Forms is explained by the fact that a complete and up-to-date set of precedents is now available in Vol. VIII of the *Encyclopædia of Forms of Precedents* (3rd edition) and attention is drawn to these in the notes in the book under review. The work is to be kept up to date by the issue of Cumulative Supplements. We have made constant use of this leading reference work, and congratulate the editors on their performance in producing a sound and up-to-date edition on a subject which is changing so rapidly as the result of parliamentary and judicial activity.

T. E. L.

Common Sense in Law. Second Edition. By Sir PAUL VINOGRADOFF.
Revised by H. G. HANBURY, D.C.L., of the Inner Temple, Barrister-at-Law. London: Oxford University Press. 1946. 192 pp.
(3s. 6d. net.)

Dr. Hanbury has rightly left the text of this little classic intact, as far as possible. The only changes are in places where the original no longer represented existing law. The book has not been spoiled by incorporating the current conflicting views on some of the topics dealt with, and recent cases only find a place when they are worthy of it, for example, *Young v. Bristol Aeroplane Co.* [1944] K. B. 718 at p. 125. The Bibliography, at pp. 180—184, has been brought up to date.

T. E. L.

Current Law. Index to the Law of 1946. By JOHN BURKE, Barrister-at-Law. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1947. 60 pp. (6s. net.)

Current Law for January, 1947. Edited by CLAUDE G. ALLEN, B.A., Barrister-at-Law. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1947. 236 sections, Index 3 pp. (42s. a year.)

Why did not someone think of this before? Everybody who has anything to do with the law, whether as practitioner, lecturer or student will find his labour lightened by this new service. Published on the 15th of each month, it contains the gist of the whole of the law for the previous month—cases in all series of reports, statutes, rules, orders, regulations and any other matter of legal significance which makes the lawyer's life a happy one, are all arranged under titles of well-defined divisions of the law in alphabetical order. Cross references are judiciously employed and there will be a cumulative index. A Year Book at the end of the year will supersede the monthly parts. We have sampled two numbers and if their high standard is maintained, then *Current Law* will fill a gap in legal equipment and provide a service given by no other publication. The editors and publishers deserve our gratitude and congratulations on this excellent venture. One suggestion for making it still more useful—when the paper emergency expires, it would be well to leave the even-numbered pages blank, so that what is required for pasting into the standard works can be accomplished without mutilating the rest of the monthly issue.

T. E. L.

Background to Indian Law. By Rt. Hon. Sir GEORGE CLAUS RANKIN, LL.D., Sometime Chief Justice of Bengal. Cambridge: At the University Press. 1946. 223 pp. (12s. 6d. net.)

The author was one of the most eminent of those who have been transplanted to the Indian High Court Bench from practice at the Bar at home, in early, and sometimes in late middle age, and without previous first-hand experience of Indian climates, languages, or conditions. After a distinguished career in the Calcutta High Court, first as puisne judge and later as Chief Justice, Sir George Rankin found himself a member of the Judicial Committee of the Privy Council. There, to paraphrase what he says in his preface, he found himself in the company of very learned and able friends, who, as the reward of exceptional knowledge and skill in the business matters of England and Scotland, were suddenly required to turn a large part of their attention to Indian appeals. It was then borne in on him, even more strongly than when he first went to India in 1918 with the smallest amount of information, and no real explanation of many facts of great historical importance,

how few people in this country have any settled notion of what we are doing administering law to Indians, how we came to be so doing, or the principles which we apply. The book which he has written succeeds admirably in clearing away the clouds, and expounding how the present law of India has grown up.

Part I treats of Civil Law and Part II of Criminal Law. The history of the processes described commenced with the chaos which confronted the East India Company when it was transformed from a trading body into an administrative authority. There followed successive steps through Regulations promulgated in India, reports by the several Law Commissions sitting in London, despatches from the Secretary of State, and debates in the earlier Indian legislatures. There emerged eventually the codes of the 'sixties and 'seventies of the last century, which are the backbone of to-day's Indian Law. Four of these codes are given special chapters of their own, the Succession, Contract and Evidence Acts, and the Indian Penal Code, and in each case a masterly analysis shows how rules from the English law came to be straightened out, and often to supersede the haphazard makeshifts of the past, and to enforce the uniformity necessary for the government of India as a whole.

In some matters uniformity was not required. Hindus and Muhammadans do not intermarry. It does not matter, therefore, to the Hindu that his Muhammadan neighbour can divorce his wife when he likes, while he himself cannot, or that the Muhammadan cannot do, what he himself can do, supply by adoption the lack of a son. It follows, for instance, that the rights acquired by succession to the estate of a deceased Muslim have no interest to the Hindu, though it would interest him greatly if the burglar of his house were to be tried by a different law code evidence and a different law of crimes, according as the offender were a Muhammadan or a Hindu.

The outcome has been the survival of uncoded portions of the old Hindu and of the Muhammadan laws which deal with what may be called, broadly, family relations, and the ultimate result is those two remarkable phenomena, modern Hindu and Anglo-Muhammadan law, both of which, to speak frankly, in many important details are the result of 'interpretation' by the High Courts and the Privy Council. An interesting chapter, Codification or Development, discusses these. From time to time the question of codification has cropped up. Sir George Rankin has observed justly that the two systems must be regarded as presenting quite different problems in this respect, and, concentrating on the development of Hindu Law by judicial decision, has shown that, so far as it is concerned, present-day signs point to an imminent experiment of partial codification.

No one was better qualified to write on all these topics than the late Sir George Rankin, whose recent death is deeply deplored. Anyone interested in India will read his book with the more appreciation, since, so far, amid all the criticisms levelled at this country's dealings with India, no voice has been heard to attack, in its salient features, the law which Britain has given to India.

A. C.

Penal Reform in England. English Studies in Criminal Science, Vol. I.
 Edited by L. RADZINOWICZ, M.A., LL.D., and J. W. C. TURNER,
 M.C., M.A., LL.B. Foreword by the Right Hon. the Viscount
 CALDECOTE. Second Edition Revised and Enlarged. London:
 Macmillan & Co., Ltd. 1946. x and 192 pp. (12s. 6d. net.)

The appearance of a second edition is evidence of the interest which this work has aroused. The eleven essays comprised in this volume deal with criminal legislation, the administration of criminal justice, special problems of juvenile delinquency and prisons. Conclusions are generally based on statistical data calculated to satisfy critical readers. Two new chapters make their appearance for the first time in

this edition. In Chapter IV. Sir JOHN Maxwell, C.B.E., reviews the English Police System from Saxon times, and the reader is shown how the efficient modern force developed from its crude origins, and he is also given an idea of present-day methods and organization. In Chapter VIII. Lt.-Col. Sir Vivian Henderson, M.C., D.L., J.P., deals with Approved Schools, their origin, the kind of persons sent to them, and the conditions under which such persons are treated. Taken as a whole, the book is a mine of information on a variety of topics, and it is warmly recommended to all those interested in the administration of criminal justice.

R. W. M. D.

The Collected Papers of John Bassett Moore. Seven Volumes. New Haven: Yale University Press. London: Humphrey Milford (Oxford University Press). 1944. (\$20.)

This collection of writings is a fitting tribute to the work of one of the most distinguished international lawyers who as a teacher, writer, adviser of the United States Department of State, and, for a time, one of the Judges of the Permanent Court of International Justice, exercised an important influence on the study and the practice of international law. There are very few writers who have combined in so felicitous a manner the advantages of a lucid and incisive style, of practical experience, and of deep scholarship. Thus the Dissenting Opinion of Judge Moore in the *Lotus* case will rank for a long time as one of the most significant pronouncements emanating from that high tribunal. His weighty reference, in that Opinion, to the majestic stream of the common law united with international law, is expressive of the temper which pervades most of his writings. It is perhaps a matter for regret that in the closing years of his literary activity he should have yielded to a somewhat unedifying combination of isolationism, moral relativism and self-styled realism.

These seven volumes, ranging over a wide period of history, cover practically every topic in the field of international law. They put at the disposal of the student valuable material which has been hitherto scattered and largely inaccessible. The publication of these volumes is due to a large extent to the devoted efforts of Professor Borchard, of Yale University, to whom the students of the subject owe a debt of gratitude for this signal achievement of piety and friendship.

H. L.

Economic and Financial Organization of the League of Nations. A Survey of Twenty-five Years' Experience. By MARTIN HILL. Washington: Carnegie Endowment for International Peace. 1946. 166 pp. (\$2.)

The title indicates adequately the object of this useful and scholarly monograph, which is by no means of mere historical importance. The organs and officials of the Social and Economic Council of the United Nations will find in these pages much that is of practical importance. The author gives a detailed account of the international attempts, under the auspices of the League, at the financial reconstruction of various countries, particularly of Austria and Hungary; of the World Economic Conference of 1927 in connection with the efforts to remove the obstacles to international trade; of the International Monetary and Economic Conference of 1933; and of the attempts to deal on an international basis with such problems as clearing agreements and exchange control, international loan contracts, raw materials, housing, standards of living, and nutrition. The concluding chapter summarizes the activities in these fields during the years 1939—1945. There is a useful annex giving the more important documents on economic and financial subjects issued by the League of Nations between the years 1920 and 1945.

The Problem of Pre-War Contracts in Peace Treaties. By ERNST WOLFF. London: Stevens & Sons. 1946. xii and 143 pp. (12s. 6d.)

It is not likely that the Peace Treaties terminating the war of 1939—1945 will follow the pattern of those concluded after the First World War, and this factor may to some extent—though perhaps not appreciably—impair the practical value of Dr. Wolff's book. For his presentation of the subject and his proposals are based largely on some lessons drawn from the provisions of the Treaties of 1919 and 1923 and, in particular, from the decisions of the numerous Mixed Arbitral Tribunals established under these Treaties. However, Dr. Wolff is not content to give a mere descriptive account of the cases decided by these Tribunals. He analyses them with learning and acumen from the point of view of principle. The result is both a valuable contribution to comparative law on the subject and a series of suggestions, of a highly practical nature, as to the future drafting and application of the relevant provisions of treaties. It is also clear that the private international lawyer will derive much instruction from the chapters which define the connection between peace treaties and municipal law on the subject, which determine the relevant municipal law, and which define the applicable notion of contract. Specially valuable are the chapters on the effect of dissolution on partly performed contracts, on quasi-contractual relations arising from pre-war contracts, and on contracts which according to the Peace Treaties have survived the war.

Effect of War on Contracts. By GEORGE J. WEBBER. London: Solicitors Law Stationery Society. 1946. pp. lxxviii and 802. (£3 17s. 6d.)

This, the second, edition of Dr. Webber's book, is three times as large as the first, published in 1940, and the increase reflects the incessant activity of the Legislature, of many Government Departments and, to a less extent, of the Courts during the interval. Dr. Webber has followed these developments with the greatest assiduity, and he now makes available to his readers a mass of new and carefully assimilated material. His readiness to revise his own opinions is noteworthy. I am confident that this edition of a book which has already established its reputation will receive a warm welcome and, in particular, from the busy practitioner. Perhaps in the next edition the distinction between the royal licence to sue required by the alien enemy and obtainable in proper cases from the Home Office and the solicitor's licence to act for him obtainable from the Trading with the Enemy Department might be further stressed.

If I may venture to utter a word of caution, it is that every book has an optimum length (and price) and that excess is apt to hurt a book. Dr. Webber's book is now quite long enough. It is no doubt useful to the busy reader to be able to find in it considerable quotations from the reports, but, in the United Kingdom at any rate, the reports are usually available and can be quoted sparingly in text-books.

A. D. McN.

Criminal Law in South Africa, with Five Lectures on Criminal Procedure. Second (enlarged) Edition. By WILLIAM PITTMAN, M.A. (Oxon), B.A. (South Africa), Judge-President, Eastern Districts Local Division, Supreme Court of South Africa, from 1918 to 1925, Dean of the Faculty of Law in the University of South Africa. Grahams-town: Grocott & Sherry (Publishers). 1945. xvi and 226 pp. (20s.)

This is a concise exposition of the principles of Criminal Law in South Africa, and is recommended to all students. The First Book deals with 'General Criminal Law,'

its nature, *actus reus* and *mens rea*, defences, attempts and parties to a crime. *Mens rea* is examined with reference to English and South African cases. With regard to English statutory crimes reference may, perhaps, be made to Dr. R. M. Jackson's contribution to 'The Modern Approach to Criminal Law' (1945) for the present-day view of certain well known English cases, since these are, in the words of the author, 'frequently cited in our courts.' The Second Book deals with 'Specific Crimes,' which are sub-divided into 'Crimes against the Person,' 'Crimes against Property,' and 'Crimes against the Public Generally.' The five lectures at the end deal mainly with proof and appeal. Throughout the book cases have been carefully chosen, and the frequent quotations from judgments bring out essential points without seeming to intrude into the text.

The following minor corrections are suggested. At p. 118 the reference to *R. v. Middleton* seems to be a mistake for *R. v. Ashwell*, 16 Q. B. D. 190. Note 1 on p. 108 will doubtless be altered in future editions after *R. v. Holmes*, 31 Cr. App. R. 123. The only slips worth noting occur at p. 42, line 7, where a page reference has been omitted, and in the footnote at p. 104, where 'Wolmington' should read 'Woolmington.'

R. W. M. D.

A Text-Book of the Law of Tort. Third Edition. By P. H. WINFIELD, K.C., F.B.A., LL.D., Emeritus Rouse Ball Professor of English Law in the University of Cambridge, of the Inner Temple, Honorary Bencher and Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1946. xxxii and 652 pp., and Index 667 pp. (35s. net.)

Reviews of the two previous editions appear in this *Journal* Vol. 6 at p. 457 and Vol. 8 at p. 338. The work has now firmly established itself as the leading text-book on the subject, and we simply note here the new edition, much of which has been rewritten in the light of the constant changes produced by the vigorous growth of judicial decision and legislation—mainly the Law Reform (Contributory Negligence) Act, 1945. We welcome the 'acknowledgement of indebtedness' expressed by Lord Simonds to Professor Winfield's Third edition in *Read v. J. Lyons & Co., Ltd.* [1946] 2 All E. R. at p. 482 and the acceptance by Scott L. J. of his definition of nuisance (§ 129, p. 426) in the same case in the Court of Appeal [1945] K.B. at p. 236. Many other passages have been judicially approved.

T. E. L.

Topham's Real Property. Tenth Edition. By His Honour Judge A. F. TOPHAM, K.C., Bencher of Lincoln's Inn. London: Butterworth & Co. (Publishers), Ltd. 1947. xlii and 455 pp., and Index 460 pp. (2ls. net.)

Many students have found Topham a short and clear introduction to a most difficult subject, but to-day there are many competitors in the field. This edition follows the model of that of 1936; relevant cases and statutes since that date have been included, and the text is accurate. Opinions vary as to the best approach but it is believed that some re-arrangement of the earlier chapters would make it more useful to a beginner.

T. E. L.

Pollock's Principles of the Law of Contract. Twelfth Edition. By P. H. WINFIELD, K.C., F.B.A., LL.D., Emeritus Rouse Ball Professor of English Law in the University of Cambridge and Honorary Bencher of the Inner Temple. London: Stevens & Sons, Ltd. 1946. xl and 571 pp. and Index 602 pp. (40s. net.)

Professor Winfield assumed responsibility for the previous edition reviewed in the *Cambridge Law Journal*, Vol. 8, p. 218. He has followed the same plan in this edition and left untouched as far as possible the original Pollock, his own additions appear in square brackets. Considerable alterations and additions have been made in bringing it up to date; for example, the parts dealing with frustration, public policy, certainty of terms and obligations attached to ownership and interests in property. Chapter 14 on 'Remedies for Breach of Contract' is a most valuable new addition; and a Table of Statutes has been added. The book is 'a legal classic,' and praise would be superfluous.

T. E. L.

A Guide to the Juvenile Court Law. Second Edition, Revised and Enlarged By G. H. F. MUMFORD, Solicitor, Clerk to the Justices, Gravesend Borough. London: Jordan & Sons, Ltd. 1947. 141 pp. and Index 150 pp. (5s. net.)

Mr. T. A. Hamilton Baynes, M.A., J.P., Chairman of the Birmingham Juvenile Panel contributes an instructive and inspiring Foreword. The book is a clear and comprehensive guide to all the law and procedure relating to juvenile courts and the treatment of juvenile delinquents, and includes the relevant sections of the Education Acts 1944 and 1946. The more important procedural points can be seen at a glance in an ingenious 'Age Table.' It is clear and concise; every clerk, magistrate, police and probation officer should have a copy.

T. E. L.

Covenants Affecting Land. By Sir LANCELOT H. ELPHINSTONE of Lincoln's Inn, Barrister-at-Law. London: Solicitors Law Stationery Society, Ltd. 1946. xxxii and 196 pp. and Index 210 pp. (30s. net.)

This is a detailed and penetrating analysis of some six hundred cases dealing with covenants of all kinds affecting land. It is the work of a master and stands in a class of its own. The summary given at pp. 1—4 is a model of brevity and clarity. The general principles are laid down in one hundred and forty three articles which are further developed and explained in notes dealing with the authorities. Particularly outstanding are the history, the bases and development of the doctrine in *Tulk v. Moxhay* at pp. 70—75; Building Schemes at pp. 83—94; the criticism of *Re Ballard's Conveyance* [1937] Ch. 473 in the light of *Northbourne (Lord) v. Johnston & Son* [1922] 2 Ch. 309 at pp. 60—61; and covenants with and by non-parties at pp. 20—22. Four appendices deal with the text of the relevant statutory provisions, pp. 154—172; a collection of Forms, pp. 173—184; of particular practical value, the meaning of certain words pertinent to covenants, pp. 185—193; and the Emergency Provisions as to Restrictive Covenants Defence (General) Regulations, 1939, pp. 194—196.

T. E. L.

Scritti di diritto Romano in onore di Contardo Ferrini. Published for the University of Pavia by G. G. Archi. 1946. Milan: Ulrico Hoepli. 1946. viii and 758 pp. (Lire 800.)

In 1942 many of Italy's leading scholars of Roman Law gathered together to commemorate the 40th anniversary of the death of C. Ferrini. The papers which were read on this occasion have now been edited and published by Professor Archi. The scientific interests of Ferrini and the external circumstances at the time of the meeting determined the character of the contributions which fall more or less into two classes. The first is concerned with the relation between Byzantine law and Classical Roman Law. The second attempts to outline the main features of Roman Law over periods of several centuries and to offer an expression of faith in Roman Legal Studies in the face of war and decline.

Classical law is the object of the studies by Riccobono, Biondi, Lauria, Gino Segrè, Voci, Frezza and Paoli. Riccobono develops with many examples his well known thesis that the evolution of Roman Law from classical to post-classical law was continuous and that the seeds of many so-called post-classical doctrines are to be found in the works of classical writers. In the present article he examines the creative work of these writers in respect of some twenty individual topics. Biondi's contribution is in the same vein. He wishes to underline the value of the fundamental concepts and of the methods of classical law for the modern lawyer, but what was a challenge when first addressed to German lawyers appears here more as a plea for the defence. Both contributions reach the same conclusion, although for different reasons: *Torniamo ai Giuristi Romani*. Lauria, in an interesting but not entirely convincing essay, discusses the difference between *jus civile* and *jus honorarium*. The former is of a personal non-patrimonial character and rights derived from it are perpetual, indivisible, indefinable, unrestricted, immutable, unconditional and not necessarily actionable. The latter is of an objective and patrimonial nature. The interrelation rather than the difference between *jus civile* and *jus honorarium* is the object of Gino Segrè's unpretentious notes. Voci examines the expansion of the concept of contract in classical law from a doctrinal point of view. Frezza makes an interesting attempt to trace the origin of the *legis actio per sacramentum* in the *conjuratio* of early Roman constitutional law. Paoli illustrates some aspects of Greek law for the openly professed purpose of interesting Roman lawyers in this branch of studies.

The papers on post-classical law also display certain common features. Albertario, Brasiello and Orestano discuss the influence of Christianity upon certain branches of Roman law. Albertario is concerned with certain trends in both parts of the Empire which he attributes to the external influence of the Church. His examination ranges over a wide complex of topics, such as the unity of the slave family, the status of children, *Manumissio in ecclesia*, *justum pretium*, *aequitas*, possession, actions against third parties, but the somewhat cursory treatment accorded to each of these topics affects the value of the study as a whole. Orestano, in a well documented article, discusses the relation between Roman and Christian marriage in the post-classical period. He rejects the modern tendency which holds that classical law required *consensus* as a formality and that post-classical law relied upon *affectus maritalis* as an *essentiale*. Instead, he believes that a slow development rather than a radical change led secular and ecclesiastical law into the same channels and that *consensus* retained its formal character. The influence of Christian doctrine upon the requirement of consent in the formation of contracts is ably examined by Brasiello. According to this doctrine *consensus* however expressed, if in accordance with the truth, renders agreements binding. Writing serves only as a confirmation, and agreements, in order to be binding, need not fall within any of the recognized categories. Justinian's legislation was much influenced by this approach to contracts.

Grosso's article on *Giurisprudenza piu antica ed elaborazione postclassica* is

accurately characterized by its sub-heading: *Coincidenze e ritorni*. Guarino's paper on the importance of Byzantine compilations for historical and critical textual studies is modest in size, but deals with a question of considerable importance and develops it with great ingenuity against the background of two vexed problems, one taken from the law of *specificatio*, the other from the law relating to *collatio bonorum*.

Solazzi offers another instalment in his series of studies entitled *Glosse a Gaio*. Whether one agrees with the author or not, his acute analysis of many well known texts is always stimulating. The last of the papers on aspects of post-classical law, but perhaps the most important in substance, is Luzzato's detailed study of the application of Imperial Constitutions in the Provinces. He holds that general and local *constitutiones* existed side by side and that in each province a register was kept which enumerated under separate headings constitutions of general and of local character.

The citations in Imperial constitutions of the writings of classical jurists form the object of Massei's learned paper which ranges from the period of the early Empire to Justinian's times and offers a valuable commentary on the standard of legal knowledge in the Empire. Archi contributes a detailed paper on the development of the system of contracts from Constantine to Justinian. He notices a tendency towards formalism, although for the purposes of evidence only, and consequently a change in the approach to *causa* which came to be regarded as the determining factor for the choice of particular formalities. At the same time the disappearance of the old concept of *causa* led to a greater freedom of contract which is noticeable in the change from *stipulatio* to *stipulationes*. Justinian's law and its sources are studied by Arangio-Ruiz, Maschi and Betti. Arangio-Ruiz, continuing in the footsteps of Ferrini himself, returns to the examination of the sources of Justinian's codification of the Paraphrasis of Theophilus and of the Basilica in a paper which is useful for the great mass of modern literature which is marshalled. Maschi shows how Theophilus' work can be used for the purpose of a critical study of the Institutes of Gaius. Betti, in a balanced study based on the method of textual criticism, detects the hand of the compilers in a number of passages which deal with resolute conditions.

This collection of essays is welcome, for it enables the student of Roman Law in other countries to acquaint himself with recent thought in Italy. It shows, in particular, that Italian scholars have turned their back on exclusive textual criticism and are concentrating again on the basic trends of Roman legal thought.

K. L.

The Medieval Idea of Law, as represented by Lucas de Penna. By WALTER ULLMANN, J.U.D. Methuen & Co. xxxix and 220 pp. (20s. net.)

The author of this book, which is introduced by one of Professor Hazeltine's graceful and suggestive prefaces, is an Austrian *doctor utriusque juris*, who, having as a young man entered upon the initial stages of a judicial career, and having qualified as a lecturer in the University of Vienna in the department of Criminal Law, was unwilling to accept Nazi doctrine and obtained employment in England. Having found the Wren Library of Trinity College a rich storehouse of medieval literature, he spent in it the greater part of his holidays during a number of years. The results of his researches, a veritable labour of love, he now produces in this book. Its title is inconveniently long, but perhaps justifiably so, for it combines some generality of treatment of medieval legal conceptions with a particular account of an undeservedly little known Italian jurist of the fourteenth century, Luca da Penne, in Latin form Lucas de Penna. (Penne is a small place in the southern part of the Abruzzi near Pescara.)

Lucas's life, ranging from c. 1320 to c. 1390, overlaps with those of the three best-known lawyers of the time, Cynus of Pistoia, c. 1270—c. 1337, Bartolus of Sassoferrato, 1314—1357, and Baldus of Perugia, c. 1320—1400. He was educated at the University of Naples which had been founded in 1224 by the heretic emperor Frederick II. He graduated in law in 1345, but never taught. There are references to his having been active as a barrister, and as a judge; in later life he held a high government office. During convalescence after a serious illness he embarked, by way of distraction, on a detailed study of Books 10, 11 and 12 of Justinian's *Code*, to the neglect of which a learned friend had called his attention. This study resulted eventually in the publication of a massive commentary, in Latin, of 1,050 folios, entitled *Tres Libri Codicis*. Lucas represents himself as having written for his own intellectual satisfaction and not for publication, and was attractively modest in regard to his performance. But the abundance of quotations from and references to him in the fifteenth century literature of his own country testifies to his prestige there. With the introduction of printing his influence spread beyond the Sicilian kingdom; his commentaries were first printed in France in 1509, and five times reprinted there. Of late few lawyers outside Italy have known of his existence, but Savigny regarded him as among the most noteworthy of fourteenth century scholars.

Lucas was a man of vast learning, both legal and philosophical. In philosophy he was a disciple primarily of Aristotle and secondarily of Cicero, whose influence is traceable in his idea of a life in harmony with nature, in his insistence on the pre-eminence of justice, his concept of the brotherhood of man, his assignment to reason of a high place in the government of the world. He was steeped in early Christian literature: the *Civitas Dei* of St. Augustine and the *Registrum Epistularum* of Gregory the Great stand out among the sources of his quotations. He had a large range of classical Latin and Greek authors at his command. He was equally well grounded in the writings of the medieval schoolmen, the one who most influenced him being the Englishman, John of Salisbury (d. 1180), whose *Policraticus* he constantly invokes. Dr. Ullmann writes, 'The spirit, outlook, detachment from contemporary affairs, the timeless character of ideas and theories, the preponderance of "the positive ethical element," the classical erudition, the fondness for quotations and illustrations of statements, are typical features of the Englishman's book and, to no less a degree, characteristic of the Neapolitan's commentaries. Like John's theory, Lucas's conception is idealistic and "bears almost an ironical complexion" if compared with the realities of medieval life; like John, Lucas stands aloof from the turmoil of the workaday world and tries to be an impartial, disinterested onlooker, whose only interest is the discovery of fundamental premisses.' Lucas differed, however, from John on a point of political theory which had great practical implications. Whereas John held that the Pope had *utrumque gladium*, the temporal sword as well as the spiritual, Lucas held that the secular authority and *imperium* are derived from God directly and not through the church as intermediary.

Dr. Ullmann's account of Lucas's legal speculations is given under six chapter headings:—The foundations and nature of law; customary law; the application of law; the administration of law; the idea of crime; social and political conceptions. I can but mention a few topics.

Justice and equity. Justice, in Lucas's view involves, in its purely idealistic sense, absoluteness of principle and rigidity of application. If applied blindly it disturbs rather than harmonizes human relations. Justice is transformed into equity by *misericordia*, which Dr. Ullmann translates as 'charity.' *Aequitas est iustitia dulcore misericordiae temperata*. Thus the primary function of equity is to be an instrument for producing a rule of law based on justice. Lucas's view as to the relation between justice and equity is in line with that of his contemporaries, and differed from that of thirteenth century jurists, who treated equity as the primary concept, whence justice is derived. This difference is in reality a difference

in the use of words. He goes on to mention two secondary functions, so important in English legal history. *In casibus in quibus jus non invenitur expressum, procedendum est aequitate servata.* Equity should be the basis of decision when a case is not covered by a legal rule. And equity is a safeguard against the mechanical, literal interpretation of law, which frequently results in a paradoxical injustice. *Rursus in legibus praeferenda est ratio aequitatis stricti juris rationi.*

The ultimate source of law. This in Lucas's view, in agreement with Roman Law, is the command of the competent authority. The competent authority is the Ruler, who holds his office by mandate from God, and is responsible to no earthly power, but to God alone. The word 'Ruler' is here used to represent any of the terms *Imperator, Rex, Princeps*, which Lucas uses indifferently. His statement *imago divinitatis est princeps* shows the falsity of the assumption, which has been made elsewhere, that the conception of the ruler as the image of God was first elaborated in the fifteenth century.

Custom as a source of law. Accordingly Lucas did not accept the contemporary view which based the binding force of customary rules on the tacit consent of the people. In his view it was the Ruler's expressed approbation—tacit acquiescence would not suffice—which made the customary rule obligatory. Presumably Lucas meant the approbation of the Ruler to include that of his officials, for he states that officials ought to observe the customs of the region in which they are employed.

Roman Law as the jus commune of the civilised world. He bases the universality of Roman Law on the same foundation, the command of a Ruler having divine authority to command. *Per Imperatores quippe Romanos Deus humano generi leges distribuit, ut dicit beatus Augustinus.* The term Roman Law refers to the whole body of law contained in Justinian's compilation, with the additions made by subsequent Imperial legislation. As to the respective jurisdiction of Roman Law and Canon law opinions differed. The scope which Lucas assigned to Roman Law was substantially larger than that admitted by Bartolus.

Criminal law. The modernity of this chapter is striking. Lucas's support can be claimed by those who hold that punishment should contain no retributory element. The sole purpose of punishment is in his opinion the prevention of future crimes, *cohibere a peccato.* It should achieve this aim by reforming the offender—*ut ipse qui prius odio habebatur corrigatur exemplo*, and by deterring potential criminals—*ut alii terreantur exemplo.*

In the administration of the criminal law he was progressive: witness his attitude towards torture which he regarded as not conducive towards truth. Not only did lay contemporary opinion approve it, but it was not repugnant to jurists: the great Bartolus is believed to have been removed from judicial office on account of over-severity in torture. Lucas warns judges against such excess of zeal.

Confessions he regards as desirable, provided that they are not extracted by *vis, metus, or fraus.* One would like to see his ideas on *fraus* in this connection developed: would he have disapproved the art of skilful cross-examination, which seeks to entrap the accused? For the purpose of obtaining evidence from witnesses, interrogation by the judge, which in the common law is non-existent except for an occasional question, Lucas regarded as of prime importance.

Civil liberty. Nowhere is Lucas's modernity more impressive than in his attitude towards civil liberty and the dignity of the individual. 'Liberty is, as he expresses it, "*lumen vitae nostrae*," whilst servitude is "*mortis imago*." The just Ruler will uphold and guarantee individual freedom and will further the cause of freedom by interfering as little as possible. There is nothing on earth more precious than civil liberty, and there is nothing more detestable than slavery: Lucas, indeed, thinks that death should be preferred to servitude. Earthly goods and material commodities exist for the sake of man, whose liberty, dignity, and personal value, being immaterial, are immeasurable in quantitative terms: "*Salus atque libertas aestimari non potest.*" Lucas believes that the liberty, happiness, and prosperity of the

individuals depend, to a very marked degree, on the adequate payment of wages for the work performed by them. This right of adequate wage he finds expressed in *Leviticus*, xix. 13, and is, therefore, an issue of the divine law itself: "*De jure divino debetur unicuique merces pro labore, juxta illud Levit. 19: 'Non morabitur apud te opus mercenarii tui usque mane.'*" The same holds true of civil law: "*Idem jure civili*," Lucas declares. Work should be rewarded according to the kind of services rendered ("*juxta mensuram laboris*"), and something more than a mere pittance ("*mercedula*") should be doled out."

This notable book ensures for Dr. Ullmann a place in the select band of experts upon medieval legal doctrine. It has been commended in many reviews: it may be of interest to mention one, which might otherwise be overlooked, by Professor de Zulueta in *Blackfriars*, October, 1946.

The Interpretation of Statutes. By Sir PETER BENSON MAXWELL. Ninth Edition by Sir GILBERT H. B. JACKSON, late Puisne Judge of the High Court of Madras. London: Sweet & Maxwell, Ltd. 1946. cxxxii and 445 pp. (£2 2s. net.)

The mere fact that the editions of any law book have given it a life exceeding three score years and ten is strong evidence of its having become a classic. The ninth edition brings the age of Maxwell's work to seventy-two years. But, apart from its long life, its excellent exposition of the law has made it of great value to judges, practitioners and teachers. The cases cited for the interpretation of words are quite rightly not limited to their occurrence in the statute concerned. A notable illustration is the decision of the House of Lords on the meaning of 'money' in a will (*Perrin v. Morgan* [1943] A. C. 399). We congratulate Sir Gilbert Jackson on this edition, and express our gratitude to him for having improved the internal guides of the book by including in it descriptive cross-headings and side-heads, and by making the tops of the pages more informative.

P. H. W.

The Law of Master and Servant. Second Edition. By A. S. DIAMOND, M.A., LL.D. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1946. xl and 318 pp. (25s.)

We welcome the second edition of Dr. Diamond's book, for there are few branches of the law that are in a more chronic state of development than that relating to employer and employee. Economically, the relation of master and servant has changed to such an extent during the last two generations that the servant might be described as master and the master as servant, and this is reflected in some degree in the law applicable to them. It is significant that Dr. Diamond has had to incorporate nearly 200 cases decided since his first edition in 1931. The brevity of the book makes it as valuable for the student as its wide range does for the practitioner, for, although details are not given of industrial legislation relating to specific occupations, or to the Workmen's Compensation Acts, we infer that the learned author quite rightly assumed that the monographs on such topics would meet the needs of the practitioner.

We venture to suggest that the statement (at p. 244) that the master is liable for the servant's tort if the servant was 'in substance engaged in the task of doing what the master employed him to do,' even though 'the particular act was contrary to the express prohibition of the master' might be qualified by adding that prohibition may nevertheless be relevant to showing that the act was entirely outside the sphere of the employment. (*Canadian Pacific Railway v. Lockhart* [1942] A. C. 591, 599; followed in *McKean v. Raynor Bros., Ltd.* [1942] 2 All E. R. 650.)

P. H. W.

Leading Cases on Criminal Law. Fourth Edition. By A. M. WILSHERE, M.A., LL.B., of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1945. vii and 506 pp. (25s. net.)

This excellent case-book on Criminal Law is too well established to require any detailed review. Suffice it to say that the learned editor has added ten new cases in the body of the text, and, in a supplement, included the leading cases down to 1945. The careful editing of the new edition has ensured its place as the best modern student's case-book on Criminal Law, essential both for University and professional examinations.

The three most valuable features for the student are (1) the emphasis on modern cases, (2) their facile presentation with concise summaries of the facts and important passages in the judgments set off in black type, and (3) brief annotations in note form from the relevant Statute Law. We look forward to the selected cases in the supplement being incorporated in the body of the book in the next edition.

We respectfully suggest that the five cases and thirty pages devoted to Gaming offences can be cut with profit. The citation to *R. v. Pitts* at page 232 should be corrected to read (1842) C. & M. 285 and (1942) A. C. 1 added as a reference to *Mancini* at page 377.

A. L. A.

Legal Aid for the Poor. ('This Is the Law' series.) By ERNST J. COHN, Ph.D., of Lincoln's Inn, Barrister-at-Law, and ROBERT EGERTON, M.A., LL.M., Solicitor of the Supreme Court. London: Stevens & Sons, Ltd. 1947. viii and 87 pp. (3s. 6d. net.)

Legal practitioners and social workers of all kinds are here adequately and accurately informed as to the facilities which exist for providing free legal assistance. Mr. Egerton has already given a very full account of this topic in *Legal Aid* published in 1945 by Kegan Paul Trench, Trubner & Co., Ltd., 10s. 6d., and it is hoped that the book under review will attain still wider publicity. Those who know his invaluable services at the Cambridge House (Poor Man's Lawyer) know that he is a master of this subject. After an admirable introduction on why legal aid is required, the authors deal with legal advice to civilians and members of His Majesty's Forces and legal aid in the Civil and Criminal Courts. The last chapter on the future of legal aid, contains a good description of the Report of the Committee on Legal Aid and Legal Advice over which Lord Rushcliffe presided (1944 Cmd. 6641). The Appendices give a list of the towns with Poor Man's Lawyer and Legal Advice Centres, addresses of Home Command Legal Aid Sections and Poor Person's Committee.

T. E. L.

Industrial Injuries. ('This Is the Law' series.) By H. SAMUELS, M.A., of the Middle Temple and Northern Circuit, Barrister-at-Law, and R. S. W. POLLARD, Solicitor of the Supreme Court. London: Stevens & Sons, Ltd. 1946. vii and 81 pp. and Index 87 pp. (3s. net.)

The object of this book is to assist trade union officers and others concerned in advising workmen on the rights they will have under the new Act. We welcome its opportune and amazingly prompt appearance. After an introductory chapter, it deals with persons who come within the scope of the Act, in which injuries and diseases are covered; the contribution payable by the employer and the insured

person; the benefits in respect of injury, disablement and death; the entirely new procedure for making claims and settlement of differences; matters to be settled by means of Regulations issued by the Minister and the alternative remedies open to the insured person.

T. E. L.

A Manual of the Law of Real Property. By R. E. MEGARRY, M.A., LL.B., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1946. xxxii, 565 pp. and Index 25 pp. (25s. net.)

This new book begins with a modest statement that it is 'primarily intended for the examination candidate whose main anxiety is not whether he will head the list, but whether he will appear in it at all.' After a helpful glossary of technical terms, the reader is led gently but very firmly through tenures, estates, law and equity (including registered charges, over-reaching and the history of uses), to chapters on future interests, settled land and trusts for sale, co-ownership and so on. And although the book is built upon a conveyancing foundation (see p. 3), it introduces something of the early history of each main topic before proceeding to expound the rules which governed it before 1926 and the alterations made by the Property Acts.

Let it not be supposed that the modest preamble implies that the difficulties and more austere parts of the subject, whether in the old law or the new, are scamped or evaded in this book. They are exposed and attacked, with the help of well-chosen illustrations and perhaps a concluding summary, so that the conscientious student cannot fail ultimately to see the light. Occasionally, it is true, he is spared the full rigour of some particularly difficult problem (*e.g.*, pp. 38, 43, 144), though even here he is told the 'probable' answer. Such problems, no doubt, will be fully treated in the larger text-book, of which the preface speaks, which is to include 'a number of additional passages scarcely suitable to beginners.'

The book has many good qualities. It is an accurate book. It gives a realistic picture of the modern law against a sufficient background of the old. It is, on the whole, a concise book; and yet one often finds in it some telling or illuminating point which other text-books lack (*e.g.*, at p. 221—strictly speaking, a sale by trustees for sale has no over-reaching effect). It is a thorough book, and this thoroughness extends to the old law, which conveyancers need to-day, as well as the new. Moreover, apart from a few verbal obscurities (*e.g.*, the sentence which begins at the foot of p. 117, and the words 'minimum' and 'maximum' in the definitions of terms of years at pp. xxxii, 29, 30, 91), it is a clear book. But it is not a book for a student who desires to look at the cases or statutes for himself. Sometimes it cites authorities; but it seems to follow no consistent plan in this respect. So far as the cases are concerned, the preface justly explains that, for the average student, 'there is little room at first for the weighing of cases.' This reasoning can hardly extend to modern statute law. Yet the detailed treatment here of the modern Acts often proceeds without indicating adequately their relevant sections (thus page 208 expounds section 22 of the A.E. A. and the rule in *Re Bridgett and Hayes' Contract* without mentioning either); and when sections are cited there is usually no indication of the relevant sub-section. This feature is particularly noticeable in the treatment, otherwise admirable, of the Settled Land Act, 1925 (pp. 180—210), where, for instance, the student is referred to the section concerned with subsidiary vesting deeds but not to those concerned with principal vesting deed and trust instrument. Similarly, the very lucid exposition of the Land Registration Act (pp. 549—561) cites only three sections, and the equally effective chapter on the Limitation Act, 1939 (pp. 526—536), only one. In a sense all this is a small matter.

It can easily be remedied in the next edition, and Mr. Megarry is about to provide an ampler book in which, we are warned, there will be authorities in plenty. Yet it seems worthy of some emphasis, since it provides a reason why those who are anxious to 'head the list' will not find this profitable little book wholly sufficient for their purpose.

S. J. B.

Jackson and Gosset's Investigation of Title. Fifth Edition. By EDMOND H. BODKIN, B.A., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1946. lxxii and 455 pp. (£2 2s. net.)

The preparation of this handy and attractive volume has evidently involved much skill and labour. *Jackson and Gosset on Title* is now nearly fifty years of age, and the previous edition appeared twenty-five years ago. The learned editor's task has thus included the incorporation of the 1925 legislation, hitherto shown in a supplement to that edition. The bulk of the book is an alphabetical digest of the relevant law, under heads ranging from 'Abstract of Title' to 'War Damage' and 'Wills.' Then follows an Appendix (23 pp.) containing various precedents and the rules as to solicitors' costs. There is a useful index (55 pp.) and the Tables of Cases and Statutes are fully adequate.

Under each alphabetical head a summary is given of the legal rules under the old law and the new, followed by a number of requisitions relevant thereto and cross-references to other material heads. The rules are stated clearly and concisely. Although primarily intended for practitioners, even academic lawyers concerned with the law of property will find these handy summaries a useful guide. Occasionally one feels, perhaps, that the guidance is a little terse, or that some improvement could be suggested, e.g., the statement (p. 278) that a restrictive covenant made before 1926 should be registered as a land charge if assigned after 1925; the omission (p. 279) of *Zealand v. Driver* in relation to *Re Ballard*, and of the limits which *Miles v. Easter* fixed for an express assignment. Moreover, the suggested requisition (p. 64) under the heading 'Contingent Remainders' seems really to concern an executory devise; and the illustration (foot of p. 250) of how a legal contingent remainder might withstand the perpetuity rule before 1926 is framed as a devise (cf. *Re Robson* [1916] 1 Ch. 116). These few comments are not intended to obscure the fact that, as one samples the pages of this edition, one recognizes a formidable task well done. And if, now and again, a conveyancer may find these able summaries insufficient for his purpose, no doubt he will have at his elbow more unwieldy volumes which will supply the detail.

S. J. B.

Where to Look for Your Law. Ninth Edition. By R. HILARY STEVENS. London: Stevens & Sons, Ltd. 1946. 285 pp. (3s. 6d.; interleaved 6s.)

This is a most useful guide to current law books arranged alphabetically under subjects and authors. A judicious selection has been made of Dominion, Colonial and Foreign law, and a complete list is given of current law reports and legal periodicals together with the abbreviations to the law reports. This edition has involved the addition of some forty pages; about a thousand titles have been added and many improvements have been incorporated. It is a real help to all interested in the law and its literature.

T. E. L.

Rating Valuation Practice. By P. R. BEAN, P.A.S.I., and A. LOCKWOOD, F.S.I. 8vo. 211 pp. Index. (21s.)

This is a most successful book. The authors set themselves as a primary object the provision of a refresher course and a concise book on valuations for rating, which would give as much practical and up-to-date information as possible in a simple form: they have achieved that end.

The work makes no pretence at legal exegesis, but where its main thesis needs legal references the text is amply and appropriately supported. The book is essentially an exposition of modern rating valuation practice, and as such is a full and brilliant contribution. The authors are obviously masters of their subject, and yet bearing in mind their prime object have avoided recondite technicalities.

The introductory chapters are an outline of basic legal principles. Three other chapters are devoted to rating procedure with particular reference to rating practice in the Metropolis. The main body of the book is a generous and clear presentation of the various methods of rating assessment, well illustrated by worked examples covering a wide range of the multiplicity of rateable hereditaments known to modern rating practice.

The authors have provided a book which will be of unquestioned worth to the practising rating surveyor, of great value to the student, and of no little interest to the solicitor specializing in rating law.

D. R. D.

Digest of the Law of Evidence. By the late Sir JAMES FITZJAMES STEPHEN, Bart., K.C.S.I., D.C.L. Twelfth Edition (revised). By Sir HARRY LUSHINGTON STEPHEN, Bart., of the Inner Temple, Barrister-at-Law, and LEWIS FREDERICK STURGE, of the Inner Temple, Barrister-at-Law. London: Macmillan & Co., Ltd. 1946. lvi and 240 pp. and Index 273 pp. (7s. 6d. net.)

In substance, this edition is a reprint of the one that appeared in 1936 but Mr. Sturge assumes sole responsibility for it. The text has been well revised and recent changes in case and statute law (particularly the Evidence Act, 1938) have been incorporated. The book is too well known to require a detailed review, it is eminently readable, and remains one of the most useful introductions to the law of evidence.

T. E. L.

Rent and Mortgage Interest Restrictions. Twentieth Edition. By the Editors of 'Law Notes.' London: 'Law Notes' Publishing Office. 1946. xxix and 365 pp. and Index 396 pp. (25s. net.)

This edition follows the style of its nineteen predecessors in usefulness and completeness. The previous edition published in 1944 has been sold out. The Furnished Houses (Rent Control) Act, 1946 (pp. 289—303), the Regulations made thereunder (Addendum, pp. 1—4), and more than sixty new decisions of considerable importance, rendered a new edition imperative. It is known to everyone who has to deal with this bewildering branch of the law: it requires no recommendation. This gallant band of editors deserve the highest tribute; we associate them with clarity, completeness, up-to-dateness and practical quality.

T. E. L.

Your Landlord and You. By ROBERT S. W. POLLARD, Solicitor. Torchstream Books, 50, Alexandra Road, London. 1946. (9d. net.)

Mr. Pollard has the gift of explaining legal technicalities to the layman. This pamphlet is written in consequence of the Furnished Houses (Rent Control) Act, 1946, and it also deals with the 'Rent Acts.' Both landlord and tenant will find many of their difficulties answered here, but they are warned of the desirability of taking legal advice before getting near a tribunal under the new Act.

T. E. L.

Advice to a Young Solicitor. (Worldly Wisdom for the Tyro.) By H. O. LOCK, Solicitor. London: Stevens & Sons, Ltd. 1946. vi and 71 pp. (4s. net.)

This little book is full of sound practical advice. The tyro is introduced to the honour and ideals of the Profession and its opportunities of increasing human happiness. He is then told how a practice may be acquired, how to make progress in it—reputation for efficiency is the best recommendation. The value of courtesy and a sense of humour, the necessity for caution and a thorough preparation in litigation and advocacy are stressed. Office administration and the keeping of accounts are clearly explained, and the sound advice is given on dealing with difficult customers.

T. E. L.

The Lawyer's Companion and Diary and London and Provincial Law Dictionary for 1947. Part I, edited by A. E. SMITH; Part II, edited by L. C. E. TURNER. London: Stevens & Sons, Ltd., and Shaw & Sons, Ltd. xxvi and 903 pp. (19s. 2d. net.)

This well-known annual is now in its one-hundred-and-first year of publication. It contains a calendar for 1947, notes on costs in conveyancing, registration of title, costs in the Supreme Court and in the County Court, Solicitors' Remuneration, Stamp Duties, Tables of many kinds and a mass of miscellaneous information on practice matters.

T. E. L.

The Mystery of 'Peter the Painter.' By P. J. EDDY, K.C. London: Stevens & Sons, Ltd. 1946. 32 pp. (3s. net.)

This admirable and detailed account of the story of the Houndsditch Murders, the siege of Sidney Street and the hunt for 'Peter the Painter' was first given in the form of a paper read to the 'Crimes Club' by Mr. Eddy. The public may now enjoy this unsolved mystery.

T. E. L.

The Law of Wills. ('This Is the Law' series.) By RUPERT CROSS, M.A., B.C.L., Solicitor, of the Law Society's School of Law. London: Stevens & Sons, Ltd. 1946. viii and 97 pp. (4s. net.)

This is an admirably clear and accurate account of the law of wills, intended primarily for the layman, which emphasizes the desirability of legal advice on difficult questions that arise. It explains why a person should make a will and what happens

if he does not ; how to make, alter and revoke a will, and the procedure for proving it. A most helpful chapter deals with a number of points which should be considered when making a will, and there is a final chapter on the winding up of an estate.

T. E. L.

How the Courts Work. By ROBERT EGERTON, M.A., LL.M., Solicitor of the Supreme Court. Published for the National Council of Social Service, 26, Bedford Square, London, by Sir Isaac Pitman & Sons, Ltd. 24 pp. (6d. net.)

The layman is well catered for in this clear and concise pamphlet. The distinction between a civil action and a criminal prosecution, the functions of solicitor and barrister and the steps in an action are elucidated. The various civil and criminal courts are described and the importance of the cost of justice is emphasised.

T. E. L.

The Higher Law. By HAROLD R. MCKINNON. California: The Gillick Press, Berkeley, California. 1946. 17 pp. (Unpriced.)

This short address, which was delivered before a conference of the judges of the Ninth U.S. Circuit, attacks the teaching of contemporary political and legal philosophers in the United States as being anti-democratic and totalitarian, and makes a plea for the revival of natural law concepts—especially the doctrine that man has certain inherent and inalienable rights.

Quarter Sessions Handbook. Second Edition. By LINTON THORP, K.C., LL.B., of Lincoln's Inn, Barrister-at-Law, Chairman of the Quarter Sessions of the County of Essex, and RAYMOND E. NEGUS, D.S.O., M.A., of the Inner Temple, Barrister-at-Law, Clerk of the Peace of the County of Essex. London: Stevens & Sons, Ltd. 1946. ix and 128 pp. (6s. net.)

The Second Edition of this little handbook consists of notes on the law procedure and practice at Quarter Sessions, arranged in alphabetical order, and thoroughly revised to June, 1946. Essentially a note-book of practical every-day points, it is in no sense a text-book, and thus is a handy guide both to laymen and lawyers, emphasizing practice rather than substantive law.

Not the least valuable feature is suggested clear and simple directions to the jury on difficult points.

The reference to the House of Lords in *Makin v. Att.-Gen. for N.S.W.*, p. 54, should be altered to read 'Judicial Committee of the Privy Council.' Further, the reference 'accessories' at p. 2 should be amplified to make it clear that they may be principals if the offence is a misdemeanour.

A. L. A.

William Howard Taft—Yale Professor of Law and New Haven Citizen. By FREDERICK C. HICKS. Yale University Press. London: Geoffrey Cumberlege. 1945. xiv and 158 pp. (16s. 6d. net.)

One of the outstanding characteristics of American public life is the ease with which professional men move from one type of career to another. Particularly is this true of the Law where the line which separates the practising lawyer from his

academic brother is much less rigid than in this country. Taft's career provides an excellent illustration of this tendency; after being President of the United States from 1909 to 1913, he became Professor of Law at Yale, resigning in 1921 when he was appointed Chief Justice of the United States, a position which he held until his death in 1930.

Little fresh light is thrown on Taft's character by Mr. Hicks' book, which sets out the events of the academic phase of Taft's life in painstaking detail. Rather his researches tend to confirm judgments already passed—that while Taft was far from being the intellectual peer of men like Holmes and Brandeis, and later his colleagues on the Supreme Court, he was a person of broad views and human understanding. He—an ex-President of the United States—was willing to pay attention to undergraduate criticism of the way in which he conducted his classes, and freely admitted that he was not *au fait* with the latest theories of jurisprudence—in this case Hohfeld's new analysis of rights and duties which in 1913 was hot from the press. Of the many examples which Mr. Hicks cites of Taft's sense of humour, considerations of space permit only one to be cited here. Taft was a man of enormous size, weighing over twenty-four stone when he left the White House. On being approached by Yale, he replied that he was afraid a Chair of Law would not be adequate, but if a Sofa of Law could be created it might be all right!

D. W. L.

La Révolte du Droit Contre le Code. By G. MORIN. Paris: Sirey. 1945. 119 pp.

The adaptation of the French Civil Code of 1804 to changing conditions is a fascinating object of studies which has attracted the attention of scholars such as Josserand, Duguit and Ripert. Their rank is now joined by Dean Morin, who devotes a little booklet to fundamental changes brought about in the French law of contract, tort and property. In the sphere of contract he notes the restriction of the freedom to contract, notably by pressure groups through collective bargaining, and by the State, *e.g.*, by Rent Restriction Legislation. In the law of Tort he observes a tendency towards increased liability, either by the extension of strict liability for dangerous objects, or by the introduction of contractual standards of duty. With the aid of the doctrines of abuse of rights and of unjustifiable enrichment the content of ownership has assumed a shape which differs greatly from that envisaged by the liberal era. Restrictions for the benefit of neighbours, and of the community as a whole, provisions in favour of the lessee similar to those contained in the English Landlord and Tenant or Agricultural Holdings Acts, have given ownership a social function. The reader is struck by the similarity of development on both sides of the Channel, and Dean Morin's little book should be a useful guide not only for those wishing to acquaint themselves with recent trends in French private law but also for English lawyers who desire to go beyond the technical aspects of law and to study law and opinion in the twentieth century.

K. L.

Small Traders and the Law. By H. I. PORTER. London: Stevens & Sons, Ltd. 1946. 112 pp. (4s. 6d.)

This volume belongs to the 'This Is the Law' series and aims at explaining such principles of law as affect the day-to-day life of the small trader. Intricate subjects arising out of emergency legislation, such as price control, purchase tax and rationing, are excluded but the learned author has, within the limited scope of the book, tackled a very wide variety of other subjects. Elements of the law relating to the

formation of partnerships and limited companies, basic principles of the formation of contracts, acquisition of premises, sale of goods and the relationship of master and servant are included. A trader's statutory responsibilities relating to the sale of Food and Drugs, Weights and Measures and Conditions of Employment are discussed and the book concludes with an outline of some legal requirements relating to the keeping of accounts and payment of Income Tax.

The book is written for laymen and succeeds admirably in its object of presenting in a succinct and readable form a statement of such legal principles as are likely to be of value to those engaged or about to become engaged in trade.

Les Criminels de Guerre et le Nouveau Droit Pénal International. Second Edition. By A. SOTTILE. Extract from the *Revue de Droit International*. No. 4. Geneva. 1945. 47 pp.

The author pleads for a permanent International Criminal Court on the ground that since war is still the normal and peace the abnormal condition of mankind, the only hope for the survival of civilization lies in the threat of criminal responsibility for the perpetrators of armed conflicts. The article, which is well documented, traces the history of the proposals for such a court during the period between the two World Wars.

K. L.

Landlord and Tenant. By R. BORREGAARD, M.A., of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1946. x and 86 pp. and Index 102 pp. (4s. net.)

This is an accurate and clear account of the main points in the evergrowing complexities of the law of landlord and tenant. Although designed for the layman a student will find it very useful. Popular fallacies are exploded in the Introduction, and answers are given to problems that crop up daily in the life of the landlord and tenant. It explains the agreement and the lease, the covenants generally found therein; rent, 'outgoings' and insurance; fixtures; assigning and subletting; how rights are enforced under a tenancy; forfeiture; and how the tenancy is determined. Separate chapters cover the tenant's compensation and rent control—control of furnished and unfurnished dwellings.

T. E. L.

Wurtzburg's Law Relating to Building Societies. Ninth Edition. By G. W. KNOWLES, M.A., of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1946. xxx and 368 pp. and Index 393 pp. (25s. net.)

This edition contains several new features and has been thoroughly revised and brought up to date. The Societies (Miscellaneous Provisions) Act, 1940, s. 5, dealing with the union of societies and the transfer of engagements between societies has added a new chapter. Another new chapter deals with additional security, in which are discussed collateral security and continuing arrangements under the Building Societies Act, 1939. The final chapter deals with emergency legislation, and an appendix of one hundred and thirty-six pages contains the text of, and notes on, the Courts (Emergency Powers) Act, 1943, the Building Societies Acts, 1874—1939, Building Society Regulations of 1895 and 1940, the arrangement by the Board of Inland Revenue as modified for 1945—1946, miscellaneous forms and a

precedent of rules for a permanent society. The effect of *Reliance Permanent Building Societies v. Harwood-Stamper* [1944] 2 Ch. 362 on the duty of a vendor society is fully treated at pp. 103—105. The new edition will be welcomed by all who deal with the practical aspect of the law of building societies.

T. E. L.

More Legal Fictions. A Series of Cases from Shakespeare, reported by A. LAURENCE POLAK, B.A., Solicitor of the Supreme Court. Illustrated by DIANA PULLINGER. London: Stevens & Sons, Ltd. 1946. 134 pp. (6s. net.)

These ten reported 'judgments,' like the ten in the author's amusing and instructive 'Series of Cases from the Classics,' first appeared in 'Law Notes.' They are 'reported' with a list of cases cited, a table of statutes and a general index. Well-known characters from Shakespeare here appear in the modern courts. The judgments are ingenious, the parodying of the modern judicial idiom is most successful. No reviewer can do them justice—they have to be read; enjoyment and instruction are guaranteed.

T. E. L.

Chalmers and Hood Phillips' Constitutional Laws of Great Britain, The British Empire and Commonwealth. Sixth Edition. By O. HOOD PHILLIPS, M.A., B.C.L., of Gray's Inn, Barrister-at-Law, Reader in English Law at the University of London. London: Sweet & Maxwell, Ltd. 1946. xxxii and 690 pp. and Index 20 pp. (30s.)

Maitland has said that 'the student who is set to read English constitutional law will, if he be prudent, take a wide view of his subject. Even if his sole object be to obtain marks in an examination, he will do well to recognize the fact that the limits of constitutional law are not strictly defined and that his examiners may not be disposed to make them narrow.' The present edition of this already popular student's book will serve that dual purpose; for the manner of presentation of the material is such that the student will be able to assimilate facts and at the same time the wealth of illustration from present day events will sustain his interest. Much of the book has been re-written and the whole has been re-cast with a view to greater lucidity and clarity of presentation. The whole of that part dealing with the British Empire and Commonwealth has been revised and this section is now particularly valuable. One of the most welcome features of the book is the way in which Professor Phillips has introduced current facts to illustrate the working of the organs of the constitution. This is most valuable in that it maintains the student's interest on subjects which too often appear to be removed from realities. In particular and by way of illustration it may be mentioned that Privileges of Parliament (pp. 100, 106) make reference to events of 1938 and 1939; the origin of the Scrutiny Committee set up in 1944 is made interesting and topical (p. 118); the Beveridge Report finds a place (p. 239); and the constitution of the War Cabinets is dealt with (pp. 202—203).

There are a number of topics, however, which are scattered about the book and the student would be helped if they could be brought together. For example, the Police system is mentioned in four different places (pp. 209 note (o), 219, 245 and 247); at p. 219 it is said that the Home Secretary 'indirectly supervises the local police forces,' but no illustrations are given of this important control. The Police Act, 1919, is mentioned (p. 446) only in connection with Incitement to Disaffection, and there is no reference to the Police Council nor to the Police (Appeals) Act, 1943, nor to the decision in *Cooper v. Wilson* [1937] 2 K. B. 309. And perhaps when dealing with the maxim, 'The King never dies,' reference might have been

made to the words of Lord Lyndhurst in *Viscount Canterbury v. Att.-Gen.* (1842), and to the possible effect on this doctrine of the Law Reform (Miscellaneous Provisions) Act, 1934.

Extensive and most useful references are given to legal literature, but it is suggested that on Act of State (pp. 415—417) reference might be made to Wade, 'Act of State in English Law,' B. Y. I. L. 1934; and on Treaties (p. 173) to Sir Arnold McNair's article, 'When do British Treaties involve Legislation,' B. Y. I. L., 1928.

These suggestions are but on minor points of detail and are not intended to detract in any way from the very substantial merits of this book, which will be extensively used by student and teacher alike.

T. C. T.

Colonial News. Vol. I. No. 8. October, 1946. London: Colonial Office Press Section, Downing Street, S.W.1.

The Death Duties. First Supplement to the Tenth Edition; free to all purchasers of that edition. By ROBERT DYMOND, assisted by R. K. JOHNS. 1947. London: Solicitors Law Stationery Society, Ltd.

Rayden's Practice and Law in the Divorce Division. Fourth (Cumulative Supplement to the Fourth Edition. By F. C. OTTWAY. London: Butterworth & Co. (Publishers), Ltd. 1946. (Main work and Supplement, 70s.; Supplement alone, 10s. 6d.)

Temple Law Quarterly. Vol. XIX., No. 4, 1946. Vol. XX., No. 1, 1946. (\$2 a year.)

Leading articles are, 'Harlan Fiske Stone,' by Hon. Wiley B. Rutledge; 'The Lasting Influence of Mr. Justice Brandeis,' by Hon. William O. Douglas; 'The Law under which Nazi Organizations are accused of being Criminal,' by Hon. Robert H. Jackson; 'Common Roots of Law and Religion,' by C. Sumner Lobingier; 'The New Trend in International Law,' by M. Vashti Burr; 'Judges and the granting of Probation,' by Frederick J. Gaudet; 'Government Liability for use of Patented Inventions,' by Hon. Tom C. Clark; 'The National Airport Program,' by Hon. Dwight H. Green; 'The Law Affecting Aviation Liability,' by George W. Orr; 'Legislative Aspects of Radio Control,' by H. B. Otterman; 'Closing Arguments for Conviction of Nazi War Criminals,' by Hon. Robert H. Jackson.

Revista Juridica de la Universidad de Puerto Rico. Vol. XV., 1945, No. 2. Nos. 3 and 4, 1946. (\$3 a year.)

Informacion Juridica. Ministerio de Justicia Comision de Legislacion Extranjera. Nos. 42 and 43, 1946. No. 44, 1947.

Borrowings in Roman Law and Christian Thought. By MIRIAM THERESA ROONEY, LL.B., Ph.D. Washington D.C. Reprinted from the *Jurist*. Vol. VI., No. 4, 1946.

A Short Sketch of English Local Government Administration. By S. BEN of Gray's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1947. x and 57 pp. (3s. net.)

The subject is dealt with from a practical point of view with the object of giving the general reader an idea of how it works and a proper appreciation of the possibilities of local government. It deals mainly with the administrative side, Education, Health Services, Police and Local Government for the main part. It can be recommended to every citizen.

Hapraklit. Vol. II., No. 12, 1945. Vol. III., No. 1, 1946. Tel-Aviv. The articles are in Hebrew. Sir ARNOLD MCNAIR, C.B.E., contributes one on Some Legal Effects of the Two World Wars on Contract. Published by the Jewish Bar Association of Palestine.

Relativism in American Law. By MIRIAM THERESA ROONEY, LL.B., Ph.D. Reprinted from Proceedings of the American Catholic Philosophical Association, Milwaukee, Wisconsin.

Derecho y Realidad en la Vida Internacional. By F. V. GARCIA-AMADOR, Profesor de Derecho Internacional Publico y Privado en la Universidad Interamericana. 1946. La Habana.

Committee in Atomic Energy, of the Carnegie Endowment for International Peace. Utilization and Control of Atomic Energy. A Draft Convention prepared by the Legal Subcommittee. 1946. Washington, D.C.

World Affairs. The London Quarterly of the London Institute of World Affairs. Vol. 12. No. 1, April, 1946. No. 2, July, 1946. No. 3, October, 1946. Vol. 1 (New Series), No. 1, January, 1947. Edited by GEORGE W. KEETON and GEORG SCHWARZENBERGER. London: Stevens & Sons, Ltd. (2s. 6d. per number.)

Modern Equity. Fourth Edition. By H. G. HANBURY, D.C.L., Fellow and Senior Tutor of Lincoln College, Oxford; of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1946. xli and 687 pp. and Index 52 pp. (37s. 6d.)

A reviewer of the third edition of this work expressed the opinion that with careful polishing and re-shaping, the fourth edition could be the best student's book on Equity. Dr. Hanbury has made the fullest use of the friendly advice of his critics and he is to be congratulated on his courageous task of overhauling almost the whole of the book. There is little doubt that this edition will become the student's first and final book on this subject. So much is completely changed that space does not permit of the changes being adverted to in detail, but the effect, whether the change is in form or substance, is to produce lucidity and retain interest. Here it may be remarked that the introduction of sections and side-headings is most welcome, and that a table of Statutes is a valuable new feature. Of the more substantial changes, the chapters on Charitable and Unlawful Trusts have been re-written and the topic of Trusts of Imperfect Obligation has been extracted from the latter category and given a short chapter of its own. Specific Performance is reconsidered in the light of the serious criticisms of the supposed principle of mutuality, and Administration of Assets is relieved of the discussion of the details of the Inheritance (Family Provisions) Act, 1938, and also of the topic of damages in respect of shortened expectation of life.

But since perfection is the goal, the following remarks are offered on matters with which the student always has difficulties. Few subjects are less inspiring than Assignment of Choses in Action, and to avoid difficulties at a later stage, it might be worth while introducing the provisions of sect. 53 (1) (c) of the Law of Property Act, 1925 (which are set out at pp. 125—6) at p. 74. On the topic of Trusts, the statement (at p. 133) that 'there will be a resulting trust for the next-of-kin, if the trusts on which a legatee has agreed to hold the property are illegal' might be modified by a comparison of *Wallgrave v. Tebbs* (p. 130) with *Moss v. Cooper* (p. 132), for, if apart from the illegality, the legatee could have retained the property beneficially, he can still do so in spite of the illegality. The ground of the decision in *Re Parsons* (p. 137, note 8) was not the fact of infancy, but that the particular appointment made was not for the benefit of the infant. The limitation on the scope of *Re Tyler* (p. 190) imposed by *Re Dalziel* might have been mentioned there, though the latter case does in fact appear in a footnote (p. 186). As to Charitable Trusts, some of the other differences between these and Private Trusts (e.g., as to the number of trustees and their ability to act by majority) might have been included (pp. 212—213). It was probably intended to advert (at p. 219) to the doubtful authority of *Re Foveaux* since the decision in *C. I. R. v. National Anti-Vivisection Society* [1945] 2 All E. R. 529, but although this case appears in the Index it has been omitted from its proper place in a footnote to p. 219. The quotation (p. 251) from Trustee Act, 1925, s. 2 (1) (b) is not strictly accurate.

The question of possible omissions is always a difficult one, but it is suggested that when dealing with protective trusts the student might be put on the track of the line of cases *Re Coleman* (1888) 39 Ch. D. 443; *Re Bullock* (1891) 64 L. T. 736; *Re Ashby* (1892) 1 Q. B. D. 872, which it is thought still impose a fetter on the 'absolute discretion' of the trustees which is mentioned at p. 195. And the subject of Unlawful Trusts might well include a reference to the *Occleston v. Fullalove* (1874), 9 Ch. App. 147, line of cases. *Grimoud v. Grimoud* (at p. 222, note 74) might usefully be compared with *Re Ward* [1941] Ch. 308. *Re Mayo* [1943] Ch. 302 might find a place at p. 263, and *Belinke v. Bede Shipping Co., Ltd.* [1927] 1 K. B. 649, with *Hart v. Herwig* at p. 572. There are a number of minor misprints: p. 158, 'donee' for 'donor'; p. 117, 'rubric'; p. 206, Lindley L.J.; p. 219, note 50, 'England' for 'Inland'; p. 241, note 42 is missing; pp. 274 and 287, the lettered

sections B and C for C and D; and since reference is made throughout to *Cheshire's 5th ed. Modern Law of Real Property*, the reference at p. 95, note 63, might be altered to p. 827 of this edition. At p. 595, note 16, a reference to Dr. Gutteridge's article in 5 *Camb. L. J.* 22, might be included.

All will admit that these are but minor criticisms and are not intended to detract from the accuracy of Dr. Hanbury's work. In spite of all the changes, its style remains vigorous and original; its copious references to and comparison with Roman Law institutions form one of the most valuable features of the book, and if another analogy may be suggested, a reference to *Att.-Gen. v. Downing (Lady)* (1766) Wilm. 1 at p. 33 might be made, for there is there an interesting extract from *The Digest* which bears comparison with *Da Costa v. De Pas* (p. 217, note 34).

T. C. T.

The Contract of Sale of Goods. Second Edition. By R. A. Eastwood, LL.D., of Gray's Inn and the Northern Circuit, Barrister-at-Law, Professor of English Law at the Victoria University, Manchester. London: Butterworth & Co. (Publishers), Ltd. 1946. viii and 166 pp. and Index 5 pp. (12s. 6d.)

It is said in the Preface to this little book that it is intended primarily for the use of those law students who wish to study the Contract of Sale of Goods as a special and therefore comparatively advanced subject, but some doubt is felt whether it will meet their needs. It is manifestly impossible within the compass of 166 pages to deal with this subject in its entirety, especially when it devotes one chapter of sixteen pages to Capacity and another of twenty-three pages to Credit Sales and Hire-Purchase. There is no doubt that the latter topic is particularly important, but its inclusion in such a small treatise inevitably leads to other matters being omitted. The subject of omissions is always a delicate one, but of the more serious ones it is suggested that *Re Wait* [1927] 1 Ch. 606 deserves at least to be mentioned. The implication (at p. 133) that goods to come from a specified source are still specific goods within the meaning of the definition given in the Act, should at least carry with it a reference to the doubt expressed by Atkin L.J. in the case cited. With *The Parchim* (pp. 76, 79) should be mentioned *The Gabbiano* [1940] p. 166; and with *The Prinz Adelbert* (p. 79), *The Orterie* [1920] A. C. 724.

The necessity for compression has inevitably led to inaccuracy on minor points. At p. 4, note 5 should be to *Isaacs v. Hardy* (1884) Cab. & El. 287, and a reference to *Samuels v. Davis* [1943] 1 K. B. 526, would be useful there. It is said (at p. 7) that there are only three ways of satisfying sect. 4 of the Act, *viz.*, (i) acceptance and receipt, or (ii) *payment of earnest*, or (iii) a written note or memorandum. The words italicised appear to lump together earnest and part payment for which there seems no justification. At pp. 50 and 53 reference to the definition of 'merchantable quality' given by Wright J. in *Canada Atlantic Grain Export Co. v. Eilers* (1929) 35 Com. Cas. 90, at p. 102, might be adverted to, for where the article is ordinarily capable of being used for one purpose only, the implied conditions of 'merchantable quality' and 'fitness for a purpose' overlap (see per Lord Wright in *Grant v. Australian Knitting Mills* [1936] A. C. 85 at p. 100.) The value of the book would be increased if it contained an Index of the sections of the Sale of Goods Act, and there is no doubt that it will be a useful introduction to the subject though much will have to be sought elsewhere.

T. C. T.

Cockle and Hibbert's Leading Cases in Common Law. Third Edition. By H. J. S. JENKINS, Barrister-at-Law. London: Sweet & Maxwell. Vol. I, Contracts, xxiv and 515 pp. Vol. II, Torts, xii and 403 pp. (£1 12s. 6d. each volume.)

Mr. Jenkins has made not a few alterations in this edition, especially (as was to be expected) in the second volume on Torts; but he says in the Preface, and rightly, that 'a conservative editing—maybe too conservative—can perhaps be not unfairly claimed for the new edition as a whole.' Although the form in two volumes is new, the older reader will recognize almost all the cases he knew in the previous edition. Mr. Jenkins should not unduly be criticized for such a retention; he is editor rather than author, and it is not every more modern decision which deserves to supplant the older authority on the same point. Still, though judgments here must differ, perhaps too many of the older cases have been retained.

Mr. Jenkins is particularly to be congratulated on the supplementary Notes which, though previously existing, have been amplified with much knowledge and discretion. He has greatly increased the value of the work by resisting the temptation to stray from the main topics of contract and tort. The book has become a good deal more coherent than it was. He is certainly right in having broken up and for the most part omitted a miscellaneous section originally given to 'Contracts and other common law matters of a special nature'; and it may be that an even greater restriction of the area of the casebook would be an advantage in the next edition.

Mr. Jenkins continues the practice of giving for the most part short excerpts from the judgments. I consider his defence of this practice (Preface, p. vii) to be sound. I would, however, suggest that in many instances a more extensive statement of the facts of the cases is required.

C. J. H.

The Institutes of Gaius. Part I. Text with Critical Notes and Translation. By F. DE ZULUETA. London: Geoffrey Cumberlege, Oxford University Press. 1946. vii and 305 pp. (20s.)

A new edition of Gaius which includes the Fragments of Antinoe was an urgent need, for Kübler's edition is not readily available. However, Professor de Zulueta has approached his task on a broader basis and now offers a text which relies on a critical selection of previous readings by the most representative scholars. The critical apparatus is kept within limited bounds, except in so far as the passages from the Fragment of Antinoe are concerned. Cross-references to other passages in Gaius himself, to the Corpus Juris and to extra-legal literature are more copious, although not quite as abundant as in Kübler's edition. The translation is good and very readable. All students of Roman law owe a debt of gratitude to Professor de Zulueta for having undertaken this laborious task and for having accomplished it with such success. The paper cover announces that a second part containing a commentary is to be published later on.

K. L.

Konstam's Law of Income Tax. Tenth Edition. By His Honour Judge E. M. KONSTAM, K.C. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1946. lxviii and 802 pp. and Index 49 pp. (70s. net.)

Under present conditions, the law of income tax must be one of the most depressing subjects that there are, both for authors and for publishers. The copious output of the Courts is supplemented by the repeated and often substantial attentions of the

legislature, and such must be the bulk of any practitioners' book on the subject that there can be little hope of getting it through the congested press of these days before much that has been written needs revision again. Before publication, this edition was beset in turn by the Finance (No. 2) Act, 1945, and the Finance Act, 1946, and in the main these have had to be dealt with by supplements. The law of income tax is pre-eminently a subject which can be dealt with satisfactorily only by great speed in publication and frequent new editions, or by loose-leaf books; and the expense and waste of the former alternative, particularly where substantial tracts of successive editions remain virtually unchanged, point strongly to the desirability of adopting the loose-leaf system, however repugnant the idea may be to the book-lover.

The two main changes in the law since the last edition of *Konstam* appeared in 1943 are the introduction of 'P.A.Y.E.', so little loved by short-staffed employers, and the new code relating to allowances for capital expenditure and depreciation laid down by the Income Tax Act, 1945. It need hardly be said that these have been clearly and satisfactorily incorporated in this edition. Further, every important decision appears to be in its proper place, and the text throughout bears signs of having been edited by someone who regards the subject, if not with affection, at least with considerably more enthusiasm than is permitted by the awe which most men feel. Yet it is a sorry commentary on our civilisation that a subject which affects the lives of so many, cannot be made more simple and intelligible, even by Judge Konstam, and that by the time this review appears, or soon after, there may well have been such changes in the law as to require many more revisions to this finely-spun web. May the next edition be in a form which, by being loose-leaf, will show a greater promise of longevity.

R. E. M.

Salmond on Jurisprudence. Tenth Edition. By GLANVILLE L. WILLIAMS, LL.D., Reader in English Law in the University of London. London: Sweet & Maxwell. 1947. xxi and 548 pp. (30s.)

As the editor in his preface remarks, 'The proper editorial policy for a work like *Salmond on Jurisprudence* is not easy to settle.' He has chosen to regard the work primarily as a text-book, and has not hesitated to 'correct' it. He has 'carried further than either of the two previous editors the alteration of the text, preferring this method to the heckling of the text in footnotes or excursions'; and he has abstained from any method of marking or distinguishing his alterations.

The result will no doubt appear to many an unfortunate jumble. Though Salmond was often in error, he had the merit of a superficially simple and easy exposition, and it was perhaps useful for at any rate the better student to have for himself to disentangle Salmond's confusions and ambiguities. In the present edition Salmond seems to this reviewer neither sufficiently 'corrected' nor sufficiently left to his own devices.

Though Dr. Williams offers some *pièces justificatives* of his alterations in Appendix V (where the alterations are listed), the alterations will to a reviewer often seem capricious. Why, for example, is Salmond not allowed to pursue his own course in his definition of law in his original sect. 15? Surely a student is likely to know that 'the definition of the word 'law' is the most discussed question in jurisprudence' and that 'some supplementary observations' may be offered? Again the editor thinks Salmond's discussion of 'justice' (sect. 19) merely silly. The editor may well be right; but should not the author's whimsies be indulged here, if they are indulged at all? In his sect. 36, Salmond essayed an obviously incomplete definition of the essential functions of a state. He happened (no doubt very erroneously) to believe that a State's function was to wage war and administer justice. Dr. Williams finds it necessary to correct the attribution to the State of

the function of waging war. Whether the correction is correct or not, the enquiry into the nature of a State still remains so incomplete that one wonders why any correction was attempted.

On the other hand, it is a matter of surprise that Salmond's remarks on ownership remain, in their main essentials, uncorrected, especially in view of the comments thereon of the school of Hohfeld, who is in general a favourite of the editor and whose 'jural correlatives' have been imported, tables and all, into Salmond's text.

Dr. Williams has often retained the *ipsissima verba* of Salmond; and yet he manages to convey a sense of pontifical condescension to his author. It would seem a mistake on the part of an editor to lavish his obviously great learning upon an author whom he so little respects. The result is unpleasing to a reader; and an unfortunate consequence may be that the reader will tend to attribute to Dr. Williams some of the grosser uncorrected errors of Salmond.

C. J. H.

Sociology of Law. By GEORGES GURVITCH, Ph.D., LL.D., D. ès L. (Sorbonne), Professor at the New School for Social Research (New York), with a preface by ROSCOE POUND, late Dean of the Faculty of Law, Harvard University. London: Kegan Paul, Trench, Trubner & Co. 1947. xv and 248 pp. (18s.)

This is a volume in the series, 'International Library of Sociology and Social Reconstruction,' and is a reprint of the book first published by Professor Gurvitch in 1942 in the United States.

Though the subject is one which the average law student will regard as remote from his usual field of work, it is nevertheless of great interest to the lawyer and is a valuable corrective to a person who has been unduly bemused by Austin's legal positivism. He will find particularly useful the introductory chapter and the survey of the relevant literature which extends from Aristotle to the latest American 'realists'; but he will greatly regret, and be much impeded by, the extraordinary language with which the author (in company with most of his colleagues) clothes and conceals his sense.

C. J. H.

The following will be reviewed in our next number:—

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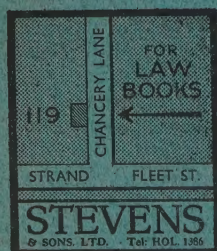
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